Applicant Details

First Name	**Samuel**
Middle Initial	**A**
Last Name	**Crimmins**
Citizenship Status	**U. S. Citizen**
Email Address	**sacrimmi@umich.edu**
Address	**Address** Street **615 S. Main Street, apt 639** City **Ann Arbor** State/Territory **Michigan** Zip **48104** Country **United States**
Contact Phone Number	**6179907921**

Applicant Education

BA/BS From	**Colby College**
Date of BA/BS	**May 2017**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 6, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Mortenson, Julian
jdmorten@umich.edu
734-763-5695
Brensike Primus, Eve
ebrensik@umich.edu
734-615-6889
Perry, Dan
Dan.perry@usdoj.gov

References

Assistant United States Attorney Dan Perry: Dan.Perry@usdoj.gov, (207) 780-3257
Professor Julian Davis Mortenson: jdmorten@umich.edu, (734) 763-5695
Professor Eve Brensike Primus: ebrensik@umich.edu, (734) 615-6889
This applicant has certified that all data entered in this profile and any application documents are true and correct.

April 24, 2022

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Dear Judge Kelly:

I am a third-year student at the University of Michigan Law School, and I am writing to apply for a clerkship in your chambers for the 2024-2025 term. Upon graduation I will join Covington & Burling in their D.C. office.

Prior to law school I learned valuable skills in time management and how to receive and incorporate feedback as a year-round collegiate athlete. I then worked my way through an M.S.Ed. program, teaching and coaching at The Hotchkiss School. My time at Hotchkiss instilled in me the value of working closely with peers and mentors as well as a sense of responsibility towards the students I taught and coached. During law school I have had the privilege to work as a research assistant for two professors, working on a diverse set of research assignments ranging from collecting and analyzing 18th century Parliamentary debates on executive power to summarizing modern public defense funding mechanisms. Through this experience I learned how to research complicated issues while working closely under the supervision of some of the leading scholars of their fields, a skill set I expect will translate well to working in your chambers. As a member of the Veterans Legal Clinic, I have argued persuasively, both in writing and before judges. During my time on the Michigan Law Review I learned the importance of paying close attention to detail and ensuring that arguments are thoroughly supported.

I have attached my resume, law school transcript, undergraduate transcript, and a writing sample for your review. Letters of recommendation from the following are also attached:

Assistant United States Attorney Dan Perry: Dan.Perry@usdoj.gov, (207) 780-3257
Professor Julian Davis Mortenson: jdmorten@umich.edu, (734) 763-5695
Professor Eve Brensike Primus: ebrensik@umich.edu, (734) 615-6889

Thank you for your time and consideration.

Respectfully,

Sam Crimmins

Samuel Crimmins

615 S. Main Street, Apt. 639, Ann Arbor, MI 48104
Cell: 617-990-7921 • Email: sacrimmi@umich.edu

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor GPA: 3.92 — Expected May 2022
Journal: Michigan Law Review (Senior Editor)
Honors: Dean's Merit Scholarship
Activities: Oral Advocacy Competition (Quarterfinalist, Board Member)
Senior Judge (Teaching Assistant for 1L Writing Class)
American Constitution Society (Class Representative)
Veterans Legal Clinic

UNIVERSITY OF PENNSYLVANIA — Philadelphia, PA
Master of Science in Education — May 2019

COLBY COLLEGE — Waterville, ME
Bachelor of Arts in Economics and History, cum laude — May 2017
Honors: Distinction in both majors; six-time NESCAC All-Academic Team
Activities: Economics Research Assistant
Men's Cross Country and Track Teams

EXPERIENCE

COVINGTON & BURLING — Washington D.C.
Incoming Associate — Beginning Fall 2022
Summer Associate — May 2021 – July 2021

- Drafted a petition for certiorari to the Maryland Court of Appeals
- Authored memoranda on Georgia civil procedure rules, developments in ESG litigation, antitrust law, and the application of the Foreign Corrupt Practices Act to Indian tribes
- Investigated corporate retirement plans and evaluated them for friendliness to LGBT employees

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Research Assistant to Professor Julian Mortenson — Sept. 2021 – Present
Research Assistant to Professor Eve Brensike Primus — Jan. 2022 – Present

- Analyze 18th century sources for instances of emergency executive actions that violated existing law and the subsequent consequences of those violations
- Research state level indigent criminal defense funding mechanisms

UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF MAINE — Portland, ME
Law Student Intern — June 2020 – July 2020

- Wrote memoranda on both civil and criminal issues, including Title VII violations, ADA law, and derivative use immunity
- Drafted motions on evidentiary suppression issues involving 4th, 5th, and 6th Amendment concerns
- Collaborated with attorneys to design an inter-agency jurisdictional guide between the Maine Marine Patrol, Coast Guard, and District Attorneys

THE HOTCHKISS SCHOOL — Lakeville, CT
Penn BSTR Teaching Fellow in Economics — August 2017 – June 2019

- Planned, organized, and taught AP Economics to classes of up to 20 high school seniors
- Co-designed an alternative honors economics curriculum
- Coached varsity cross country and track & field

ADDITIONAL

Interests: Boston sports teams, science fiction, and chess

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Crimmins,Samuel Albert
Student#: 66889012

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2019	**(September 03, 2019 To December 20, 2019)**							
LAW	510	001	Civil Procedure	Len Niehoff	4.00	4.00	4.00	A-
LAW	520	001	Contracts	Daniel Crane	4.00	4.00	4.00	A
LAW	530	001	Criminal Law	Kimberly Thomas	4.00	4.00	4.00	A-
LAW	593	004	Legal Practice Skills I	Beth Wilensky	2.00		2.00	S
LAW	598	004	Legal Pract:Writing & Analysis	Beth Wilensky	1.00		1.00	S
Term Total				**GPA: 3.800**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.800**		**12.00**	**15.00**	
Winter 2020	**(January 15, 2020 To May 07, 2020)**							
During this term, a global pandemic required significant changes to course delivery. All courses used mandatory Pass/Fail grading. Consequently, honors were not awarded for 1L Legal Practice.								
LAW	540	002	Introduction to Constitutional Law	Daniel Halberstam	4.00		4.00	PS
LAW	580	001	Torts	Scott Hershovitz	4.00		4.00	PS
LAW	594	004	Legal Practice Skills II	Beth Wilensky	2.00		2.00	PS
LAW	737	001	Higher Education Law	Jack Bernard	4.00		4.00	PS
Term Total					**14.00**		**14.00**	
Cumulative Total				**GPA: 3.800**		**12.00**	**29.00**	

Continued next page >

Control No: E189031701 Issue Date: 04/16/2022 Page 2

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Crimmins,Samuel Albert
Student#: 66889012

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2020		**(August 31, 2020 To December 14, 2020)**						
LAW	451	001	Global Constitutionalism	Daniel Halberstam	2.00	2.00	2.00	A
LAW	601	001	Administrative Law	Julian Davis Mortenson	4.00	4.00	4.00	A
LAW	641	001	Crim Just: Invest&Police Prac	Eve Primus	4.00	4.00	4.00	A
LAW	719	001	Good with Words Storytelling	Patrick Barry	1.00		1.00	S
LAW	799	001	Senior Judge Seminar	Ted Becker	2.00		2.00	S
LAW	900	133	Research	Barbara Mcquade	1.00	1.00	1.00	A
Term Total				**GPA: 4.000**	**14.00**	**11.00**	**14.00**	
Cumulative Total				**GPA: 3.895**		**23.00**	**43.00**	
Winter 2021		**(January 19, 2021 To May 06, 2021)**						
LAW	657	001	Enterprise Organization	Albert Choi	4.00	4.00	4.00	A-
LAW	716	001	Complex Litigation	Maureen Carroll	4.00	4.00	4.00	A-
LAW	730	001	Appellate Advoc:Skills & Pract	Evan Caminker	4.00	4.00	4.00	A
LAW	799	001	Senior Judge Seminar	Ted Becker	2.00		2.00	S
Term Total				**GPA: 3.800**	**14.00**	**12.00**	**14.00**	
Cumulative Total				**GPA: 3.862**		**35.00**	**57.00**	
Fall 2021		**(August 30, 2021 To December 17, 2021)**						
LAW	612	001	Alternative Dispute Resolution	Allyn Kantor	3.00	3.00	3.00	A+
LAW	675	001	Federal Antitrust	Daniel Crane	3.00	3.00	3.00	A
LAW	677	001	Federal Courts	Leah Litman	4.00	4.00	4.00	A
LAW	772	001	Corporate & White Collar Crime	Vikramaditya Khanna	4.00	4.00	4.00	A
Term Total				**GPA: 4.064**	**14.00**	**14.00**	**14.00**	
Cumulative Total				**GPA: 3.920**		**49.00**	**71.00**	

Continued next page >

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Crimmins,Samuel Albert
Student#: 66889012

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Winter 2022			**(January 12, 2022 To May 05, 2022)**					
Elections as of:			04/16/2022					
LAW	669	002	Evidence	Len Niehoff	4.00			
LAW	900	233	Research	Eve Primus	2.00			
LAW	900	303	Research	Julian Davis Mortenson	1.00			
LAW	978	001	Veterans Legal Clinic	Matthew Andres Carrie Floyd	4.00			
LAW	979	001	Veterans Legal Clinic Seminar	Matthew Andres Carrie Floyd	3.00			

End of Transcript
Total Number of Pages 3

This transcript is printed on special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required.

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University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

Official Copies

An official copy of a student's University of Michigan Law School Cumulative Grade Report and Academic Record is printed on a special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required. A black and white is not an original. Any alteration or modification of this record or any copy thereof may constitute a felony and/or lead to student disciplinary sanctions.

The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

MICHIGAN LAW
UNIVERSITY OF MICHIGAN
701 South State Street
Ann Arbor, MI 48109-3091

JULIAN DAVIS MORTENSON
James G. Phillipp Professor of Law

April 25, 2022

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Dear Judge Kelly:

I write to recommend my student and research assistant Sam Crimmins for a clerkship in your chambers. Sam is an exceptionally smart, exceptionally decent, and exceptionally thoughtful student who is certain to be an exceptionally excellent law clerk and lawyer. And at a personal level, he's a delight—a true mensch who will contribute greatly to chambers happiness and harmony.

I met Sam when he took my Admin Law class in the fall semester of 2020. From the start, he was incredibly impressive: thoughtful, professional, insightful, with an understated but razor-sharp intelligence that made interactions with him a great pleasure. He has an intellectual bent, with a great and obviously sincere pleasure in simply playing with ideas to see how they do (and don't) fit together, and on more than one occasion he offered a comment that led me to see some aspect of the problem being discussed differently. We also had a small masked group get-together in my backyard, so I had the chance to see him interact with his peers; he was so clearly well liked and at ease in the group that it was quickly apparent that his peers have the same appreciation for Sam's approach that I do.

Sam's writing is unusually excellent. I gave the students a memo assignment halfway through the semester, in which they were called on to analyze the application of a complex and poorly drafted weapons statute to a complicated fact pattern involving unusual weapons carried and used in unusual ways. Sam's memo was just a gem of an effort from start to finish: gracefully written and richly analyzed, with a rigorous and lucid analytical structure and deep analysis of each of the component parts of the problem. He executed his "battle of canons" analysis with particular flair, creatively and systematically exploring the different possible commonalities in a list of terms for purposes of both noscitur a sociis and expressio unius. Looking back at the memo now, I am struck by the enthusiasm of my comments in the margins: "excellent crisp intro", "good!" (3 times), "VERY good", "TERRIFIC," and "great work!"

On that background, it was no surprise when Sam turned in one of the best exams in the class, easily earning an A for the semester. His exam was beautifully written, achieving the same kind of spare elegance he'd achieved in his memo—except this time in a timed environment with only 3 hours to complete the whole thing. Richly detailed and rigorously organized, his answers dived deep into the complexities of the Administrative Procedure Act and the constitutional rules on appointment and removal without ever once losing the forest for the trees. Particularly impressive was his meticulous dissection of the complex series of events leading to an agency ruling—from statute to regulation to interpretation of the regulation to an ALJ's application of that interpretation—and precise attention to the different forms of challenge and levels of review that applied to each. Very few people in the class achieved this level of precision with the most complex problem in the exam, and Sam did it about as well as it could be done.

I thought so highly of Sam's writing and intellect that I asked him to be my research assistant during his 3L year, and was delighted when he said yes. He was absolutely terrific in that role, jumping right into the investigation of complex questions of emergency powers in the eighteenth century in both England and North America. The conceptual structure of the problems he helped investigate was really tricky: when taking action in the face of emergency, did a series of executive actors in the seventeenth-century Anglo-American world have authorization under a statute; was there a more nebulous necessity claim under common law; or was the executive action taken entirely without legal authorization in the anticipation of later forgiveness from the legislative branch—and how can we tell the difference? On top of that, the sources were old and hard to navigate, often using structure and vocabulary that mapped on only poorly to the modern legal doctrine with which a law student most familiar. And Sam took to all of it like a duck to water, delivering timely, well-written analysis of important questions at an exceedingly high level of quality. I was really grateful for his help.

In the longer run, Sam hopes to work as an attorney in government-facing matters, either as an agency attorney or in a private practice group that focuses on agency regulation. He double majored in economics and history, and jokes about becoming a "committed technocrat," loving how policy arguments needed to be backed up by data, arguments about the effects of changes in law leading to changes in behavior, and the concepts of optimization and efficiency. Given the appeal of this kind of thinking, he's taken to law school like a duck to water and waxes enthusiastic about the joy he finds in immersing himself in the craft and

Julian Mortenson - jdmorten@umich.edu - 734-763-5695

techniques of legal analysis. And it just made me smile to hear the joy he took in working for the U.S. Attorney last summer and the thrill of writing briefs that were filed in court—a first-time feeling that I remember very well.

I hope it's clear I hold Sam in extremely high regard. I'd be delighted to share anything else I can to facilitate your consideration of his application; please don't hesitate to get in touch if I can be at all helpful.

Best regards,

Julian Davis Mortenson
James G. Phillipp Professor of Law
Michigan Law School

University of Michigan Law School
625 S. State St.
Ann Arbor, MI 48109

Eve Brensike Primus
Yale Kamisar Collegiate Professor of Law
ebrensik@umich.edu

April 24, 2022

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Dear Judge Kelly:

I am pleased to write this letter of recommendation in support of Samuel Crimmins's clerkship application. As his academic record demonstrates, he is an excellent thinker and scholar. His hard work and keen intellect have garnered him a spot in the top 5% of his class. Sam is smart, hardworking, and earnest. He has all of the skills that a judge would want in a law clerk, and I have no doubt he will be an exceptional law clerk to whomever is fortunate enough to hire him.

I first met Sam in the fall semester of his second year in law school when he was a student in my criminal justice course. He was one of the most valuable classroom participants in a course with almost ninety students. I could always rely on Sam to give a lucid and insightful account of the relevant doctrine. He has an innate ability to learn legal doctrine quickly and, at the same time, immediately detect where the doctrine is most vulnerable. He is also adept at devising creative and innovative solutions to legal problems.

I was not surprised to learn that Sam excelled, not only in the Zoom classroom, but also on law school exams. Sam wrote one of the top three exams in the class. When I drafted the final examination for my criminal justice course, I included some questions designed to test the students' abilities to spot and analyze legal issues and other questions that pushed students to think about the policy underlying the doctrine. Many students performed well on one set of questions, but not the other. Sam, however, was equally skilled at both.

When answering issue-spotters, his writing was systematic, logical, and clear. He was able to identify the issues quickly, address both sides of the argument, and formulate reasoned conclusions based on the governing case law. For example, one complicated fact pattern involved the stop and search of a vehicle. Sam's answer deftly wove through the Fourth Amendment's various exceptions to the probable cause and warrant requirements as he discussed both the case law and the policy rationales for the doctrine. Not only did he correctly identify all of the issues; he also wrote clearly and succinctly, analogizing to and distinguishing the relevant precedent with ease. I am confident that he will prove to be a wonderful asset in drafting bench memoranda and judicial opinions.

Sam also did well on the policy questions, demonstrating that he not only understands the law, but can address the reasoning behind it and provide innovative and insightful suggestions on how the law might be improved. I know that Sam would prove invaluable during discussions about how to address difficult legal issues that come through your chambers.

In addition to his sharp intellectual and analytical skills, Sam would also come to your chambers with a diverse background and set of experiences. Before law school, Sam taught advanced economics courses as part of his masters program in education at the University of Pennsylvania. During law school, Sam has sought out opportunities to learn about both the civil and criminal sides of the law, interning at the United States Attorney's Office in Maine after his first year and at Covington & Burling in Washington, D.C. last summer. Sam ultimately hopes to pursue a career in government service either working for the Department of Justice or the Securities and Exchange Commission.

Finally, Sam is a delight to work with. He is smart, respectful, diligent, and self-motivated. I know that he would fit easily into any group of law clerks. I believe that Sam's intellect, dedication, and skill set will make him a wonderful law clerk.

Please feel free to contact me should you require any additional information.

Sincerely,

Eve Brensike Primus

Eve Brensike Primus - ebrensik@umich.edu - 734-615-6889

U.S. Department of Justice

United States Attorney
District of Maine

100 Middle Street
6th Floor, East Tower
Portland, ME 04101

(207) 780-3257
TTY (207) 780-3060
Fax (207) 780-3304
www.usdoj.gov/usao/me

May 24, 2021

To Whom It May Concern:

I understand that Samuel Crimmins has applied to be a law clerk following his graduation from the University of Michigan School of Law in May 2022. I supervised Sam during his summer internship at the United States Attorney's Office for the District of Maine in 2020. Despite working in an unusual work setting caused by the Covid pandemic, Sam displayed the highest levels of professionalism and talent, and I believe he would distinguish himself as a judicial law clerk. I enthusiastically recommend him without reservation.

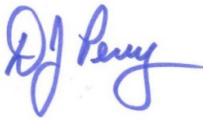
Sam arrived at the United States Attorney's Office eager to contribute to meaningful cases. Although we were relegated to an entirely remote working situation, we soon learned that Sam is a tireless worker who is quick to assume substantial responsibility. From the outset, I was comfortable assigning Sam with meaningful work requiring complex legal analysis. Sam's written product included a response to a motion to suppress. He skillfully analyzed legal and factual issues involving the admissibility of statements voluntarily made to a government agent. His analysis and work product were so good, his response was filed in the case as the Government's response. Another attorney presented a work assignment for Sam to analyze Fourth Amendment issues in a traffic stop setting. His analysis and written product in that matter were also superb. Sam consistently completed assigned tasks ahead of schedule and demonstrated sound judgment.

Without exception, Sam's written product exceeded the high standards of our office and contributed to favorable judicial decisions. His work was always thorough, carefully researched, and clearly presented. Sam listened to instructions and asked appropriate questions. His work product clearly stands out among the law students with whom I have worked during my over twenty years in the United States Attorney's Office.

Sam is the type of person I would want on my team no matter what the endeavor. He is smart, wise beyond his years, polished, and articulate. I believe his intellect, curiosity, and personality would make him an exceptional judicial law clerk. Please do not hesitate to contact me if you would like to discuss Sam's qualifications further.

Sincerely yours,

DONALD E. CLARK
ACTING UNITED STATES ATTORNEY



Daniel J. Perry
Assistant United States Attorney

Samuel Crimmins
615 S. Main Street, Apt. 639, Ann Arbor, MI 48104
Cell: 617-990-7921 • Email: sacrimmi@umich.edu

The following writing sample is a portion of my final paper for my Appellate Advocacy class. The premise of the assignment was that Robert Mueller had charged Donald Trump with three counts of obstruction of justice based on 18 U.S.C. §§ 1505, 1512(b), and 1512(c) while President Trump was in office. I was assigned to represent Donald Trump in an interlocutory appeal from a motion to dismiss. I have included the Table of Contents to give a sense of the arguments I made but I have included only Part II given the length of the document.

While we were given a limited number of sources to draw on and outside research was prohibited, the writing and the arguments are mine and mine alone.

No. 20–0001

In the
United States Court of Appeals
for the District of Columbia Circuit

President Donald J. Trump,

Defendant-Appellant,

v.

United States of America,

Plaintiff-Appellee.

On Appeal from the United States District Court
for the District of Columbia
No. 2020 GULO GULO

Brief for Appellant President Trump

CO17
Mara Lago
Counsel for Donald J. Trump
1100 S. Ocean Blvd.
Palm Beach, FL 33480
Phone: (561) 832-2600
MaraLago@gmail.com

Table of Contents

II. Even If The President Does Not Have General Immunity From Criminal Liability, These Statutes Do Not Apply To the President Because They Do Not Expressly Apply To The President And Would Violate The Separation Of Powers If They Did

The United States has charged the President under three statutes: 18 U.S.C. §§1505, 1512(b), and 1512(c). 18 U.S.C. §1505 prohibits "whoever" from corruptly obstructing, impeding, or influencing a proceeding before a department or agency of the United States or the exercise of inquiry before either House of Congress. 18 U.S.C. §1512(b) likewise prohibits "whoever" from corruptly intimidating another person to influence a proceeding. Finally, 18 U.S.C. §1512(c) punishes "whoever corruptly" destroys, alters, or conceals a record or otherwise obstructs, influences, or impedes an official proceeding. Corruptly in this case means "acting with an improper motive." (R. 1: 105). A "proceeding" for purposes of 18 U.S.C. § 1512 includes court proceedings, proceedings before Congress, or a proceeding before an agency. 18 U.S.C. §1515(c).

The statutes share three common elements: 1) an obstructive act, 2) a nexus between the obstructive act and an official proceeding; and 3) a corrupt intent. (R. 1: 104). The operative verbs in the statute are broadly defined and "can refer to anything that makes difficult or hinders an investigation." (R. 1: 105.) The nexus requirement can include relations in time, logic, or causation between an act and a proceeding, but the proceeding need not be already in progress. *Id.* The intent element of corruptly extends to acting with "an improper motive" and can render an actor's facially legal conduct unlawful. *Id.*

None of these statutes apply to the President. Basic canons of statutory construction counsel against interpreting statutes as applying to the President, absent an express indication, where a conflict of separation of powers may arise. Regardless of whether the President is generally immune from criminal prosecution, application of these specific statutes to the President would violate the separation of powers. The President influences proceedings in the exercise of his constitutionally assigned functions. To subject his facially legal everyday duties to a searching inquiry into his motivations would chill the exercise of his duties as Chief Executive.

A. The Statutes Do Not Apply To The President Because They Do Not Say They Apply To The President

Two canons of statutory interpretation apply. Both involve judicial reluctance to decide constitutional issues where alternative interpretations of statutes are viable. The canon of constitutional avoidance states if one construction of a statute would raise serious constitutional problems, courts should opt for an alternative interpretation if that alternative interpretation is fairly possible. *Crowell v Benson*, 285 U.S. 22, 62 (1932). A fundamental anchor of judicial restraint, the principle pairs two concerns: the pragmatic concern that constitutional questions should not be carelessly confronted, and the assumption Congress would not intend to pass unconstitutional laws. Dellinger at 3.

The clear statement rule is a "very well-established" principle of statutory interpretation. *Id.* at 2. It is a stronger but narrower invocation of the canon of constitutional avoidance. The rule commands courts to not interpret statutes as

applying to the President absent express command to the contrary "if such application would involve a *possible* conflict with the President's constitutional prerogatives." *Id.* (emphasis added). Other sources have described the clear statement rule as applying when constitutional issues are "significant" or "arguabl[e]." William Barr, Memorandum from Bill Barr to Rod Rosenstein on Mueller's "Obstruction" Theory 4 (June 8, 2018) (hereinafter "Barr"); Robert Mueller, Report on the Investigation Into Russian Interference in the 2016 Presidential Election 4 (hereinafter "Mueller"). Each iteration demonstrates that the standard to trigger the canon is relatively low; if a court notices one interpretation of a statute could conflict with the President's constitutional exercise of his duties, then it should decline to interpret it in that way unless it is the only possible interpretation.

This canon has firm roots in two Supreme Court decisions. First, in *Public Citizen*, the Court construed the term "utilized" as not applying to the President's utilization of the American Bar Association to recommend judicial nominees. *Public Citizen v. Dept. of Justice*, 491 U.S. 440, 467 (1989). Admitting a straightforward reading of the term required imposing restrictions on the President and despite a lengthy delve into legislative history, the Court still found the statute's application to the President a close question. *Id.* at 453, 455–65. In addition to invoking the general canon of constitutional avoidance, indicating the presence of a serious constitutional problem, the Court stressed "[o]ur reluctance to decide constitutional issues is especially great where, as here they concern the relative powers of coordinate branches of government." *Id.* at 466. The Court noted it would resist any

conclusion "that Congress intended to press ahead into dangerous constitutional thickets *in the absence of firm evidence* that it courted those perils." *Id.* (emphasis added). Because the statute would place restrictions on the President's ability to nominate judges, the Court declined to apply the statute to the President's use of the ABA. *Id.* at 465–67. Had legislative history or the canon of constitutional avoidance been sufficient, the Court would have had no need to invoke a higher standard applicable to separation of powers concerns. Rather, the Court's reliance on a heightened avoidance cannon that searched for firm evidence of Congressional intent decided the issue.

Second, in *Franklin v. Massachusetts*, the Court held the President was not an "agency" under the APA. *Franklin*, 505 U.S. at 801. The APA defined agency as "each authority of the government of the United States," but specifically excepted Congress, the federal courts, territorial governments, and the government of the District of Columbia. *Id.* at 800. It did not explicitly except the President. *Id.* Despite the apparent inclusion of the President under the definition of agency, the Court refused to apply the APA to the President. *Id.* at 801. Instead, the Court held that textual silence was insufficient to subject the President to the APA: "As the APA does not *expressly* allow review of the President's actions, we must presume that his actions are not subject to its requirements." *Id.* (emphasis added). The Court specifically pointed to the separation of powers doctrine and the unique constitutional position of the President in holding an express statement was necessary to subject the President to the APA and thus limit his ability to conduct the Census. *See id.* at 800–01.

All three of the statutes here fall prey to the same ambiguity and are amendable to two possible interpretations. Each statute applies to "whoever." The term whoever either includes the President or it does not. Because the statutes would limit the ability of the President to influence proceedings before courts, Congress, and agencies, a task he is constitutionally empowered to do, a separation of powers issue is triggered.[1] The question becomes whether "whoever" is an express statement under *Franklin*.

To construe "whoever" as an express statement indicating Congress has carefully considered the constitutional issue, *see Public Citizen* 491 U.S. at 466, robs the word express of its meaning. Merriam-Webster's online dictionary defines express as "directly, firmly, and explicitly stated." *Express*, Meriam-Webster Online Dictionary (2021). In contrast, whoever is a general term meaning "whatever person: no matter who." *Whoever*, Meriam-Webster Online Dictionary (2021). That is the opposite of explicitly stating the President is covered under the statute. In determining the President was not an agency, the *Franklin* Court ruled that "each authority of the Government of the United States" was insufficiently precise. *Franklin*, 505 U.S. at 800–01. "Each authority of the [federal] government" is far more precise than the term "whoever." It cabins its application only to certain federal authorities and the exceptions of Congress, the courts, etc. demonstrated some consideration by Congress about which of those authorities it would apply to. The general term "whoever" reflects no such careful consideration of congressional

[1] The following section explains how the statutes impede the President.

intent. The Court should not assume the term "whoever" reflects Congress "courted [these] perils." *Public Citizen*, 491 U.S. at 466.

B. Application Of These Statutes To The President Violates The Separation Of Powers

Because the three charged statutes implicate separation of powers concerns, the balancing test weighing the burdens placed on the President against the government's interest applies. *Nixon*, 418 U.S. at 711–12. Here, application of the statutes to the President would have a paralyzing effect on the executive branch.

The President necessarily influences proceedings in the normal discharge of his duties. The President could issue a directive to the DOJ to shift resources away from prosecuting marijuana use and to request lenient sentences for marijuana offenders. The President has the authority, as chief law enforcement officer, to enact the policy. U.S. Const. art II §3. The President would lawfully both alter court proceedings by changing the requested sentence and impede proceedings by draining resources away from ongoing and future cases. But now imagine all of the above happens with one change, the President's niece was charged with possession and trafficking after purchasing a joint while on a road trip and driving across state lines one month before announcing the policy.

Under the prosecution's theory, the President could be charged under §1512(c) and face two decades in prison for what is otherwise a completely legitimate exercise of his executive power. There is a relation in time from the proceeding and the act, and there is an act that fits the definition of impede or alter. The only question is the President's motivation. But the President could have

completely legitimate reasons, ranging from scarce prosecutorial resources to recognition of changing state law. There may be no way to tell which reasons motivated the President.

The Special Counsel's own examples illustrate the problem with this approach. The Special Counsel suggests action taken to end a criminal investigation into the President's own or family member's conduct to protect against personal embarrassment is a core example of corrupt conduct. Mueller at 13. Meanwhile, a decision to curtail a law enforcement investigation to avoid international friction would not implicate these statutes. *Id.* But what if to avoid international friction, the President halts an investigation into a foreign banker that might also implicate his sister in a related scheme? The same logic applies to agency proceedings under §1505. If the President orders a tax provision be interpreted a certain way which coincidentally relieves pressure on a donor facing an audit, he may be guilty of obstruction. The President could violate § 1512(b) by simply asking a subordinate not to testify in a civil lawsuit against a rocket company to protect national security secrets in which the President's cousin has a financial stake. *See* (R. 1: at 106).

These examples illustrate the point that Presidents make decisions altering or impeding proceedings. And sometimes the President's motivations will either not be immediately clear or will have competing justifications, some pure and some politically or personally motivated. Corruptly is an extraordinarily murky mens rea. An "improper purpose" does not provide any meaningful warning when the President may have many legitimate reasons for undertaking an action that also happen to indirectly benefit him.

To subject exercises of executive action to a post-hoc autopsy, inquiring into the President's precise motivations, weighing their relative weight, and attaching criminal liability if the motivations are deemed "improper" is an unacceptable invasion into the executive sphere. Attaching criminal liability to acts the Constitution empowers the President to perform, with the dispositive factor being the President's subjective intent, cripples the ability of the President to perform his duties. The Court in *Fitzgerald* cautioned against just this kind of burden. *Fitzgerald*, 457 U.S. at 756–57.

The burdens are difficult to overstate. Every time the President takes an action that could influence a court or agency proceeding, he must examine himself to ensure he is completely free from any direct or indirect taint of personal or political gain from the action. The President would be perpetually at risk of criminal sanctions. If he faces years in prison every time he chooses to take a policy action, why should he act at all? Under threat of criminal liability he is certain to shirk from exercising discretion in criminal proceedings lest there be some indirect benefit, disempowering the executive branch from performing its functions. *See McDonnell v. United States*, 136 S. Ct. 2355, 2372–73 (2016). The Court has noted attaching civil liability to officials that hinges not on their facially lawful acts but on the intent behind those acts has special costs which are especially disruptive to effective government. *Harlow v. Fitzgerald*, 457 U.S. 800, 816–17 (1982). That disruptive effect only rises when the penalty is criminal liability, and it rises to the level of constitutional impermissibility when the chilled individual is the President,

in whom the Constitution vests the entirety of the executive power and whose hesitation undermines a branch of government.

The government's retort that the President need only keep a record of his motivations to exculpate himself in the event of an obstruction charge fails for three reasons. First, nothing in the Constitution conditions the President's exercise of executive functions on the President keeping a journal of his thoughts throughout the day. Second, the motivations behind a decision may relate to issues of national security or classified secrets, the contents of which cannot be disclosed. Third, the government's solution is just as susceptible to the opposite interpretation. Unprompted and unsolicited denials of guilt rarely have their intended effect. If the President felt the need to justify his motivations behind a decision, then that implies the President was aware he did have an impermissible motivation. One can just as easily interpret the President's need to create a prophylactic justification as evidence of guilt as one of innocence.

Congress and the courts have no overriding interest in applying these statutes against the President. Congress is fully capable of conducting investigations with an eye towards impeachment if they believe the President improperly influences proceedings and the political process is the appropriate arena in which to sort out these disputes. Congressional committees frequently launch investigations into administrative and executive agencies; criminal prosecution is not a prerequisite to congressional fact finding. The injury to the judiciary is likewise small. While the President finds himself exposed to criminal liability for almost every action he undertakes that impacts a proceeding, the courts would

merely not be permitted to apply a set of statutes against one individual. The President is not involved in so many cases as to imperil the judiciary. Presidential obstruction of justice will be rare. The interest in stopping the President from performing lawful acts but with motives others may find objectionable does not justify the imposition of criminal liability that would effectively freeze out important executive actions, especially considering Congress will be able to monitor and impeach the President if it suspects corruption.

Even if the Court finds this balancing close, the clear statement rule and canon of constitutional avoidance provide an answer. This Court need recognize only that the constitutional burdens imposed on the President arguably or possibly outweigh competing interests. This is not a case where, like a bribery statute that clearly applies to the President given the acceptance of a bribe is explicitly forbidden by the Constitution and labeled grounds for impeachment, no separation of powers concern is raised. Dellinger at 4 fn.11. The application of these statutes to the President would diminish the President's ability to perform his assigned functions by subjecting him to post-hoc inquiries into his state of mind, substantially chilling his decision making. Absent express indication to the contrary, there is no need to construe the statutes as reflecting congressional intent to wreak havoc in the executive branch.

Applicant Details

First Name	**Alexa**
Last Name	**Den Herder**
Citizenship Status	**U. S. Citizen**
Email Address	**alexaden@pennlaw.upenn.edu**
Address	**Address** **Street** **3201 Race St. Apt 603** **City** **Philadelphia** **State/Territory** **Pennsylvania** **Zip** **19104** **Country** **United States**
Contact Phone Number	**3192158845**

Applicant Education

BA/BS From	**University of Iowa**
Date of BA/BS	**May 2017**
JD/LLB From	**University of Pennsylvania Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 12, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of International Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Keedy Cup**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Duncan, Matthew
mhduncan@law.upenn.edu
(215) 746-8771
Levy, Michael
mlevy3@law.upenn.edu

References

Jessie Liu, jessie.liu@skadden.com, 202-371-7340

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ALEXA DEN HERDER
3201 Race Street, Apartment 603 | Philadelphia, PA 19104
(319) 215-8845 | alexaden@pennlaw.upenn.edu

April 5, 2022

The Honorable Timothy J. Kelly
United States District Court for the District of Columbia
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, District of Columbia 20001

Dear Judge Kelly:

I am a third-year law student at the University of Pennsylvania Law School. I am writing to request your consideration of my application for a clerkship for the 2024-25 term. Immediately following law school, I will clerk for Judge Steven M. Colloton on the Eighth Circuit Court of Appeals and then return to Skadden DC as an associate, where I will work in the firm's litigation group. I am confident these experiences will uniquely prepare me for a clerkship in your chambers.

Enclosed are my application materials, including my resume, writing sample, law school transcript, undergraduate transcript, and letters of recommendation. Please note on my transcript that Moot Court Board and Conservative Political and Legal Thought are yearlong commitments that do not receive credits until the end of the school year. My letters of recommendation are from Professor Matt Duncan (mhduncan@law.upenn.edu, 215-746-8771) and Professor Michael Levy (mikel31556@gmail.com, 610-574-6717). Please let me know if any other information would be useful. I can be reached by phone at 319-215-8845 or by email at alexaden@pennlaw.upenn.edu. Thank you for your consideration.

Respectfully,

Alexa S. Den Herder

Encls.

ALEXA DEN HERDER
3201 Race Street, Apartment 603 | Philadelphia, PA 19104
(319) 215-8845 | alexaden@pennlaw.upenn.edu

EDUCATION

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, Philadelphia, PA
J.D. Candidate, May 2022

Honors: Associate Editor, *Journal of International Law*, Vol. 42; Keedy Cup Quarterfinalist
Activities: The Federalist Society, Vice President of External Affairs; Moot Court Board; Intramural Mock Trial; Penn Law Women's Association; Penn Law National Security Society; Morris Fellow Program

UNIVERSITY OF IOWA, Iowa City, IA
Bachelor of Arts, high distinction, Political Science & International Relations (with Honors), May 2017
Minors in Russian & History

Honors: Phi Beta Kappa, Pi Sigma Alpha, President's List, Dean's List
Thesis: International Courts: Can They Restrain Major Powers?
Activities: Kappa Alpha Theta, HR Director; College Republicans, Chairwoman; Alumni Advisory Board

EXPERIENCE

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, Des Moines, IA
Incoming Judicial Law Clerk to the Honorable Steven M. Colloton August 2022 – September 2023

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Washington, DC
Summer Associate May 2021 – July 2021
Wrote memoranda on the False Claims Act, evidentiary issues, and motions to compel.
Prepared presentation on cryptocurrency regulation for partner.
Conducted analysis of Supreme Court cases from 1999 to present identifying unresolved issues of law.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF IOWA, Des Moines, IA
Judicial Intern to the Honorable Rebecca Goodgame Ebinger June 2020 – August 2020
Wrote memoranda on legal issues including habeas corpus, courtroom closures, and preliminary injunctions.
Attended revocation, sentencing, and evidentiary hearings.

UNITED STATES SENATE COMMITTEE ON FINANCE, Washington, DC
Assistant Press Secretary January 2019 – May 2019
Corresponded with national press on issues concerning tax, trade, and healthcare.
Wrote talking points for Chairman Grassley on topics within the Committee's jurisdiction.
Maintained the Committee's social media presence on Facebook and Twitter.

OFFICE OF SENATOR CHUCK GRASSLEY, Washington, DC
Assistant Press Secretary March 2018 – May 2019
Wrote and published press releases highlighting the Senator's legislation.
Traveled with the Senator to coordinate media coverage of public speaking events.
Assisted the Senate Judiciary Committee with hearings, social media, and rapid response press coverage.

OFFICE OF SPEAKER PAUL D. RYAN, Washington, DC
Staff Assistant May 2017 – March 2018
Wrote policy memoranda on behalf of the Speaker's general counsel and tax counsel.
Advanced special events such as the State of the Union.
Coordinated meetings between Members of Congress and the Speaker.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION (NASA), Washington, DC
Intern, Office of International and Interagency Relations May 2016 – August 2016
Wrote and negotiated cooperative agreements between NASA and foreign governments.
Organized an aviation safety seminar held in Moscow in Spring 2017.

LANGUAGE & INTERESTS

Russian (intermediate proficiency), cycling, Tae Kwon Do (black belt), postmodern literature, space exploration

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AT THE LAW SCHOOL
*** * * * * * * * * * * ACADEMIC PROGRAM * * * * * * * * * * ***

School: LAW
Division: LAW
Degree Program: JURIS DOCTOR
Major: LAW

*** * * * * UNIVERSITY OF PENNSYLVANIA COURSE WORK * * * * * ***

Fall 2019		**LAW**			
LAW	500	Civil Procedure (Wolff) - Sec 3	4.00	SH	B+
LAW	502	Contracts (Wilkinson-Ryan) - Sec 3	4.00	SH	B+
LAW	504	Torts (deLisle) - Sec 3A	4.00	SH	B
LAW	510	Legal Practice Skills (Duncan) - Sec 3A	4.00	SH	CR
LAW	512	Legal Practice Skills Cohort (Mancuso)	(0.00)	SH	CR
		Term Statistics:	16.00	SH	
		Cumulative:	16.00	SH	
Spring 2020		**LAW**			
LAW	501	Constitutional Law (Shanor) - Sec 3A	4.00	SH	CR
LAW	503	Criminal Law (Katz) - Sec 3	4.00	SH	CR
LAW	510	Legal Practice Skills (Duncan) - Sec 3A	2.00	SH	CR
LAW	512	Legal Practice Skills Cohort (Mancuso)	(0.00)	SH	CR
LAW	583	Judicial Decision-Making (Scirica)	3.00	SH	CR
LAW	598	Financial Regulation (Sarin)	3.00	SH	CR
		Term Statistics:	16.00	SH	
		Cumulative:	32.00	SH	
Fall 2020		**LAW**			
LAW	555	Professional Responsibility (Ashton/Winokur)	2.00	SH	A
LAW	604	Sentencing (Kyriakakis)	2.00	SH	A
LAW	607	Antitrust (Hovenkamp)	3.00	SH	A
LAW	612	Appellate Advocacy (Duncan)	3.00	SH	A-
LAW	631	Evidence (Levy)	4.00	SH	A
LAW	822	Journal of International Law - Associate Editor	1.00	SH	CR
		Term Statistics:	15.00	SH	
		Cumulative:	47.00	SH	
Spring 2021		**LAW**			
LAW	601	Administrative Law - UL (Lee)	3.00	SH	B+

LAW	638	Federal Courts (Struve)	4.00	SH	B
LAW	649	Interdisciplinary Child Advocacy Clinic (Finck/deLuria/Nagda)	6.00	SH	A-
LAW	813	Keedy Cup Preliminaries (Gowen)	1.00	SH	CR
LAW	822	Journal of International Law - Associate Editor	(0.00)	SH	CR
		Term Statistics:	14.00	SH	
		Cumulative:	61.00	SH	

Fall 2021 **LAW**

LAW	622	Corporations (Fairfax)	4.00	SH	A-
LAW	693	Church and State (Gordon)	3.00	SH	A-
LAW	804	Moot Court Board: Yearlong	(2.00)	SH	NR
LAW	949	Law and Morality of War (Finkelstein)	3.00	SH	A-
LAW	956	Conservative Political and Legal Thought (Wax)	(1.50)	SH	NR
		Term Statistics:	10.00	SH	
		Cumulative:	71.00	SH	

Spring 2022 **LAW**

LAW	536	Legal Interviewing and Client Counseling (Chacko)	(2.00)	SH	NR
LAW	762	National Security Law (Finkelstein)	(3.00)	SH	NR
LAW	804	Moot Court Board: Yearlong	(2.00)	SH	NR
LAW	943	Federal Habeas Corpus (Hintz)	(3.00)	SH	NR
LAW	956	Conservative Political and Legal Thought (Wax)	(1.50)	SH	NR
		Term Statistics:	0.00	SH	
		Cumulative:	71.00	SH	

*** * * * * * * * * * * * COMMENTS * * * * * * * * * * * ***

In response to the COVID-19 pandemic, specific divisions within the University of Pennsylvania granted alternate grading options for academic terms that were impacted. See COVID-19 Alternate Grading Policies in the Archives of University Catalogs for details.

Participant, Ninth Annual Intramural Mock Trial Tournament, Spring 2020;

*** * * * * * * NO ENTRIES BEYOND THIS POINT * * * * * * * ***

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

April 05, 2022

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Re: Clerkship Applicant Alexa Den Herder

Dear Judge Kelly:

I'm delighted to recommend Alexa Den Herder for a clerkship. I taught Alexa for a full year as a 1L, and for an additional semester as a 2L, and she was an excellent contributor in my class. She's hardworking, friendly, a strong thinker, highly professional, and brings unusual maturity and judgment to her work.

Some quick background. I'm a longtime practicing class action lawyer now on the full-time faculty at Penn, where I teach in the areas of legal writing, professionalism, complex litigation, and appellate advocacy. One of my classes, Legal Practice Skills, is a mandatory, full-year course for 1Ls that focuses on the fundamentals of real-world research, writing, and practice. The program involves extensive faculty/student interaction and individual feedback on written assignments, group projects, simulated supervisor meetings, mock courtroom arguments, and the like. I get to know each student well and review a sizeable sample of their work in a variety of settings. I also teach an upper-level class in appellate advocacy.

Alexa took both classes, and I was impressed with her work ethic, professionalism, collegiality, and good judgment. First, she's unusually disciplined and mature, and thus handles her business like a pro. Second, she's kind, friendly, and collegial, and thus thrives in group work environments (I observed this first-hand on multiple occasions). Third, her analytic skills are on point and she handled the substance of all assignments—both written and oral—with a knack for cutting to the heart of an issue. In short, my overall experience with Alexa was terrific. She's hardworking, capable, and very nice, and I'm happy to recommend her for a position.

Sincerely,

Matt Duncan
Senior Lecturer
mhduncan@law.upenn.edu
(215) 746-8771

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

April 05, 2022

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Re: Clerkship Applicant Alexa Den Herder

Dear Judge Kelly:

I am writing this letter as a reference for Alexa Den Herder, who has applied for a clerkship. I am an adjunct faculty member at the University of Pennsylvania Carey Law School and Ms. Den Herder was a student in my Evidence class last fall. Before teaching at Penn, I was a lawyer for 50 years and for more than 37 of them I was an Assistant United States Attorney in the Eastern District of Pennsylvania. Ms. Den Herder not only got an A in the course, she was an excellent participant in class. I taught the class remotely using a panel system of six students per class to be on call. The class contained about 30 students so I saw each student about once every three weeks. Ms. Den Herder was consistently well prepared and clearly grasped the material. She did come to my online office hours a few times and her questions showed very careful thinking and a good understanding of the material.

As you know from her résumé, she spent two years working between college and law school. In my experience, that usually means a more mature student and her performance in my class certainly confirmed that. In short, I can give her an unequivocal recommendation. I think she will prove to be an excellent law clerk. If you have any questions, feel free to contact me.

Sincerely,

Michael Levy
Adjunct Professor
mikel31556@gmail.com
610-574-6717

ALEXA DEN HERDER
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WRITING SAMPLE

The attached writing sample is a memorandum I drafted during my 1L summer internship for Judge Rebecca Goodgame Ebinger of the District Court of the Southern District of Iowa. The assignment was to write a memorandum as guidance for ruling on a motion to close the courtroom during a civil jury trial. I performed all of the research, and this work is entirely my own. All identifying facts and names have been redacted for confidentiality purposes. I am submitting the attached writing sample with the explicit permission of Judge Ebinger.

MEMORANDUM

TO: Judge Rebecca Goodgame Ebinger

FROM: Alexa Den Herder

DATE: June 9, 2020

RE: Courtroom Closure

Question Presented

Under Eighth Circuit law, in a civil jury trial involving allegations of sexual assault committed against a juvenile plaintiff, what factors should the Court consider in determining whether a courtroom closure is warranted? Second, if the juvenile plaintiff attains majority by the time of trial, is there a different conclusion?

Analysis

The First Amendment guarantees the press and general public the right of access to criminal trials. *Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty*., 457 U.S. 596, 603 (1982). This right serves to ensure "that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Id.* at 604. The Supreme Court has not extended this right to civil trials, though some circuit courts have. *See Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984) (acknowledging a First Amendment right of access to civil proceedings); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984) ("[W]e agree with the Third Circuit ... that the First Amendment does secure to the public and to the press a right of access to civil proceedings."). The Eighth Circuit has declined to explicitly extend the right of access to civil trials but has acknowledged "that the public has a great interest in the fairness of civil proceedings." *Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371, 1378 (8th Cir. 1990); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983).

The First Amendment right of access is not absolute. In *Globe Newspaper*, the Supreme Court established that a courtroom may be closed to the public and the press during a criminal trial if the State shows "that denial of such right is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest." 457 U.S. at 596. This interest must be evaluated on a case-by-case basis and articulated in particular findings. *Id.* at 597; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

Protecting the physical and psychological well-being of a minor sex victim is a compelling state interest in criminal trials. *Globe Newspaper*, 457 U.S. at 607. When weighing this interest in deciding to close the courtroom, the court should consider factors such as "the minor's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of the parents and relatives." *Id.* at 608. In *United States v. Farmer*, the Eighth Circuit weighed these factors in determining that the district court did not abuse its discretion in ordering the closure of a courtroom during the testimony of a seventeen-year-old female sex abuse victim. 32 F.3d 369, 372 (8th Cir. 1994). The court concluded that the victim's age, the brutal nature of the offense, and the victim's well-reasoned fear of her assailant and his family was "more than enough" to justify the decision. *Id.* at 372; *see also In re The Spokesman-Review*, 569 F. Supp. 2d 1095, 1102 (D. Idaho 2008) (holding that protecting a minor sex victim from further harm and embarrassment significantly outweighs the First Amendment interests of the public). Conversely, in *United States v. Thunder*, the Eighth Circuit declined to uphold a district court's decision to grant a motion to close the courtroom during minor victims' testimony, noting the district court closed the courtroom because "requiring children to testify in public . . . could only expose them to voyeuristic or prurient interests." 438 F.3d 866, 867 (8th Cir. 2006). The court found this argument untenable because it was overbroad and based on "no particular findings." *Id.*

The well-being of a minor has also been found to be a compelling state interest in civil trials when the court is considering whether to restrict courtroom access. *Webster Groves*, 898 F.2d at 1375. In *Webster Groves*, the Eighth Circuit held that neither the First Amendment nor common law granted a newspaper publisher access to a preliminary injunction hearing in a civil case where the plaintiff was a handicapped minor. *Id.* at 1377. The plaintiff newspaper argued the district court failed to weigh the *Globe Newspaper* factors in its decision to close the courtroom. *Id.* at 1376. The Eighth Circuit reasoned that because *Globe Newspaper* "involved a criminal case with a minor victim, not a civil proceeding in equity concerning a handicapped child," the district court was not obligated to apply the factors. *Id.* Ultimately, the Eighth Circuit held the courtroom closure was justified because of a strong public policy interest in the "special protection of minors and their privacy where sensitive and possibly stigmatizing matters are concerned." *Id.* at 1375; *see also Doe v. Sante Fe Indep. Sch. Dist.*, 933 F. Supp. 647, 651 (S.D. Tex. 1996) (holding that that closure of a trial on damages is justified to protect the anonymity of the minor plaintiffs due to the possibility of "social ostracization and violence due to militant religious attitudes").

Once a compelling state interest has been identified, a courtroom closure must be narrowly tailored to serve that interest. *Globe Newspaper*, 457 U.S. at 607. In doing so, the court may consider a partial or total closure of the courtroom. According to Eighth Circuit precedent, whether a closure is partial or total "depends not on how long a trial is closed, but rather who is excluded during the period of time in question." *United States v. Thompson*, 713 F.3d 388, 394 (8th Cir. 2013). For example, a complete closure involves "the exclusion of all members of the public and press, where a partial closure involves excluding less than the whole of the public and press, such as everyone but a testifying victim's family during the victim's testimony." *Irby v. Smith*, No. 15-CV-1997(PJS/TNL), 2016 WL 11491386, at *6 (D. Minn. Jan. 27, 2016). In *United States v. Thompson*, a criminal case, the courtroom was closed during a witness's testimony because the

defendant's family had threatened the witness. 713 F.3d at 391. The Eighth Circuit found that this partial closure was narrowly tailored to the interest of protecting the witness because the courtroom was not cleared until the witness testified and only the defendant's family members were excluded. *Id.* at 396. The Eighth Circuit considered this a partial closure of the courtroom because it was still open to members of the public and press save for the defendant's family members. *Id.* at 395. In *United States v. Yazzie*, the Ninth Circuit found the complete closure of a courtroom during the testimony of minor sex victims was narrowly tailored to the asserted interest because "the district court closed the courtroom only when the child victims took the stand." 743 F.3d 1278, 1289 (9th Cir. 2014). Consistent with Eighth Circuit precedent, the Ninth Circuit considered this a complete closure of the courtroom because all spectators, including members of the public and press, were excluded. *Id.* at 1291. While the strict scrutiny test required in criminal cases was not explicitly applied in *Webster Groves*, the Eighth Circuit found that a total courtroom closure was appropriate because of an interest in protecting the privacy of minors. 898 F.2d at 1373; *see also Doe*, 933 F. Supp. 647 at 652 (demonstrating how a courtroom closure was narrowly tailored to protect the privacy of minors in a trial on damages).

The compelling interest of protecting a minor usually dissipates when the minor becomes an adult, though cases involving sexual assault may be different. Courts have found protecting the physical and psychological well-being of minors is generally a compelling state interest because the youth are particularly vulnerable. *See, e.g.*, *Doe*, 933 F. Supp. at 647 (holding that "the youth of the minor Plaintiffs makes them particularly vulnerable"). Courts have also found that adults tend to be less vulnerable to social and physical intimidation and violence than minors. *Id.* For example, in *Mardis v. Hannibal Public School District No. 60*, the district court denied the adult plaintiff's motion to strike and remove his juvenile police record, finding that protecting his privacy was less of a compelling interest because he was no longer a minor. No. 2:08CV63 JCH,

2009 WL 5103277, at *1 (E.D. Mo. Dec. 17, 2009). However, there is more room for discretion when it comes to cases involving rape and sexual assault. In *Harris v. Stephens*, the Eighth Circuit held that in a case of a twenty-three-year-old rape victim, "the closing of the courtroom to spectators during the testimony of a victim . . . is a frequent and accepted practice when the lurid details of a [rape] must be related." 361 F.2d 888, 891 (8th Cir. 1966). More recently, the Eighth Circuit held that "an otherwise public criminal trial may be closed, at least to the general public, when a young victim is called to testify regarding an alleged sexual offense." *Crawford v. Minnesota*, 498 F.3d 851, 853 (8th Cir. 2007); *see also U.S. ex rel. Latimore v. Sielaff*, 561 F.2d 691, 694 (7th Cir. 1977) (holding that the exclusion of spectators during the testimony of a twenty-one-year-old rape victim was appropriate).

Conclusion

There is Eighth Circuit precedent for closing a courtroom to the general public and press in both criminal and civil trials. To justify the closure under the First Amendment in criminal trials, the closure must be necessitated by a compelling governmental interest and narrowly tailored to serve that interest. When the compelling interest is protecting the well-being of a minor, the Court should consider factors such as "the minor's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of the parents and relatives." *Globe Newspaper*, 457 U.S. at 608. However, because the Eighth Circuit has not extended the First Amendment right of access to civil trials, the trial court may consider the factors laid out in *Globe Newspaper* but is not legally bound by them. *Webster Groves*, 898 F.2d at 1376. Finally, when a minor becomes an adult during proceedings, the privileges granted by *Globe Newspaper* are not usually sustained. However, due to the nature of sexual assault and rape, age may be less of a factor in cases where victims are testifying.

Applicant Details

First Name	**John**
Middle Initial	**M.**
Last Name	**Graham**
Citizenship Status	**U. S. Citizen**
Email Address	**jgraham@jd22.law.harvard.edu**
Address	**Address** Street **32 Copley St., #2** City **Cambridge** State/Territory **Massachusetts** Zip **02138** Country **United States**
Contact Phone Number	**9492017901**

Applicant Education

BA/BS From	**University of Virginia**
Date of BA/BS	**May 2017**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 26, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Law & Policy Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Global Antitrust Institute** **Ames Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Kaplow, Louis
meskridge@law.harvard.edu
617-495-4101
Solomon, Matthew
msolomon@cgsh.com
202-974-1680
Mihir, Desai
mdesai@hbs.edu
617-495-6693

This applicant has certified that all data entered in this profile and any application documents are true and correct.

JOHN MICHAEL GRAHAM
32 Copley Street, Unit #2, Cambridge, MA 02138 | jgraham@jd22.law.harvard.edu | 949-201-7901

May 9, 2022

The Honorable Timothy James Kelly
U.S. District Court for the District of Columbia
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, NW
Washington, D.C. 20001

Dear Judge Kelly:

I am writing to apply for a clerkship in your chambers for the 2024-2025 term. I have recently completed my studies at Harvard Law School and will be graduating this month. After attending the University of Virginia, I worked in Washington, D.C. for two years and am looking very much forward to moving back with my fiancée, whose family lives in Bethesda. As aspiring federal government lawyers, we are committed to careers in the DC area. Accordingly, I am applying only to courts locally. Due to my dream of becoming an antitrust litigator, I am focused exclusively on district court clerkships in order to immerse myself in the particulars of trial practice.

As a student, I have honed my skills in legal research, analysis and writing. My research for Professor Kaplow has ranged from sourcing and reviewing the academic literature concerning market power and taxation to interpreting proposed competition statutes and analyzing their likely effects. As an Executive Managing Editor of the *Harvard Law & Policy Review*, I have been intimately involved in substantively improving and technically preparing numerous articles for publication.

In addition to my work as a student, I would also bring to your chambers my experience in complex litigation as both a legal assistant and an associate. Attached are my resume, law school transcript and writing sample. You will be receiving separately letters of recommendation from the following people:

Professor Mihir Desai	Professor Louis Kaplow	Matt Solomon
Harvard Law School	Harvard Law School	Cleary, Gottlieb, Steen & Hamilton
mihdesai@law.harvard.edu	meskridge@law.harvard.edu	msolomon@cgsh.com
(617) 495-6693	(617) 495-4101	(202) 974-1680

It would be an honor to further discuss how I might contribute to the important work of your chambers. Thank you for your time and consideration.

Sincerely,
John Graham

JOHN MICHAEL GRAHAM

32 Copley Street, Unit #2, Cambridge, MA 02138 | jgraham@jd22.law.harvard.edu | 949-201-7901

EDUCATION

Harvard Law School, Cambridge, MA
J.D. Candidate, expected May 2022
Activities: Professor Louis Kaplow, Research Assistant in Antitrust & Taxation
Harvard Law & Policy Review, Executive Managing Editor
Ames Moot Court Competition, Quarter-Finalist
HLS Antitrust Association, Co-President

University of Virginia, Charlottesville, VA
B.A. in Economics; B.A. in Political Philosophy, Policy, & Law with Highest Distinction, May 2017
Activities: UVA Law School, Research Assistant
McIntire School of Commerce, Commercial Law Teaching Assistant
Madison House, Volunteer Tutor
External jobs: Server, Boylan Heights; Food Runner, Downtown Grill; Sales, Nordstrom

EXPERIENCE

Cleary, Gottlieb, Steen & Hamilton, Washington, D.C.
Associate, beginning September 2022; *Summer Associate*, May – July 2021
- Provided swift factual analyses and ongoing support to trial team during multi-week FTC administrative proceeding
- Analyzed enforcement outcomes and interpreted relevant statutory provisions in order to provide advice to Fortune 500 investment bank

California Department of Justice - Antitrust Unit, San Francisco, CA
Summer Law Clerk, May – July 2020
- Authored memoranda addressing urgent questions of law in the AG's flagship antitrust case – including arguments used to defeat a motion to continue the preliminary approval hearing for a $575 million settlement
- Conducted extensive review of internal documents of target and competitors in order to compose memorandum regarding potentially anticompetitive conduct of a Fortune 500 firm

Sullivan & Cromwell, LLP, Washington, D.C.
Antitrust Legal Assistant, June 2018 – July 2019
- Presented competitive analyses and various findings to partners on a daily basis, regularly participating in client calls and periodically interfacing directly with the clients
- Drafted presentations for the DOJ and FTC used in obtaining merger clearances in multi-billion-dollar transactions spanning finance, defense, pharmaceuticals, and other industries
- Managed up to four legal assistant case teams, ensuring timely delivery of high-quality work appropriately prioritized in light of changing deadlines

Litigation Legal Assistant, June 2017 – June 2018
- Supported attorney teams in research, case management, and materials preparation

PUBLICATIONS

Co-Author, *One Share, One Vote — For Democracy's Sake*, Tech Policy Press (2021)
Update Author, *California Antitrust and Unfair Competition Law*, Ch. 23 Public Enforcement (2020)

PERSONAL INTERESTS

Golf, Formula 1, squash, snowboarding, and board games (particularly, Settlers of Catan)

Harvard Law School

Date of Issue: February 1, 2022
Not valid unless signed and sealed
Page 1 / 2

Record of: John M Graham
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2019 Term: August 27 - December 18

1000	Civil Procedure 4 Cohen, I. Glenn	P	4
1001	Contracts 4 Frug, Gerald	P	4
1006	First Year Legal Research and Writing 4B Zubrzycki, Carly	P	2
1004	Property 4 Donahue, Charles	P	4
1005	Torts 4 Hemel, Daniel	H	4

Fall 2019 Total Credits: 18

Winter 2020 Term: January 06 - January 24

1055	Introduction to Trial Advocacy Sullivan, Ronald	CR	3

Winter 2020 Total Credits: 3

Spring 2020 Term: January 27 - May 15

Due to the serious and unanticipated disruptions associated with the outbreak of the COVID19 health crisis, all spring 2020 HLS academic offerings were graded on a mandatory CR/F (Credit/Fail) basis.

1024	Constitutional Law 4 Eidelson, Benjamin	CR	4
1002	Criminal Law 4 Crespo, Andrew	CR	4
1006	First Year Legal Research and Writing 4B Hornstine, Adam	CR	2
2478	Lawyers! Your Sensibility Needs Work! Parker, Richard	CR	2
1003	Legislation and Regulation 4 Freeman, Jody	CR	4

Spring 2020 Total Credits: 16
Total 2019-2020 Credits: 37

Fall 2020 Term: September 01 - December 31

2000	Administrative Law Freeman, Jody	P	4
8049	Democracy and the Rule of Law Clinic Berwick, Ben	H	2
2146	Law and Economics Kaplow, Louis	H	2
2994	Legal Tools for Protecting Democracy and the Rule of Law in America Berwick, Ben	H	2
3009	M&A Litigation Fried, Jesse	H	2

Fall 2020 Total Credits: 12

Spring 2021 Term: January 25 - May 14

2386	Administrative Law in the Modern Era Vermeule, Adrian	H	2
2099	Antitrust Law & Economics - Global Elhauge, Einer	P	5
2048	Corporations Ramseyer, J. Mark	P	4
7000W	Independent Writing Fried, Jesse	H	1
2146	Law and Economics Kaplow, Louis	H	2

Spring 2021 Total Credits: 14
Total 2020-2021 Credits: 26

Fall 2021 Term: September 01 - December 03

2475	Challenges of a General Counsel: Lawyers as Leaders Wilkins, David	H	2
2062	Economic Analysis of Law Shavell, Steven	H	3
2169	Legal Profession Wacks, Jamie	P	3
2234	Taxation Desai, Mihir * Dean's Scholar Prize	H*	4

Fall 2021 Total Credits: 12

Winter 2022 Term: January 04 - January 21

2091	Food and Drug Law Hutt, Peter Barton	~	3

Winter 2022 Total Credits: 3

continued on next page

Assistant Dean and Registrar

Harvard Law School

Record of: John M Graham

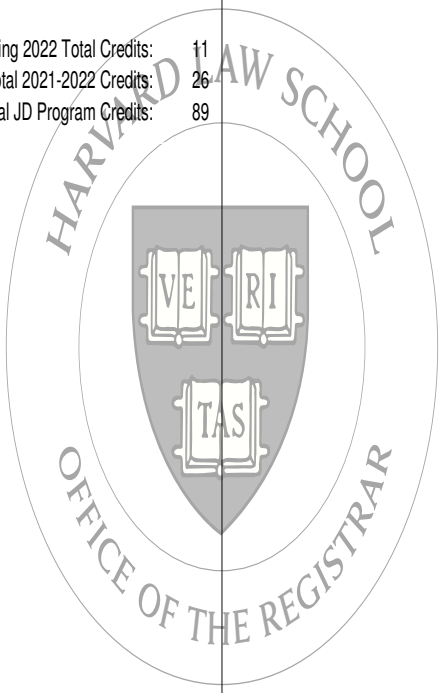
Date of Issue: February 1, 2022
Not valid unless signed and sealed

Spring 2022 Term: February 01 - April 22

2035	Constitutional Law: First Amendment Feldman, Noah	~	4
2079	Evidence Lvovsky, Anna	~	4
2183	Mediation Hoffman, David	~	3

Spring 2022 Total Credits:	11
Total 2021-2022 Credits:	26
Total JD Program Credits:	89

End of official record



Assistant Dean and Registrar

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems
Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)

Magna cum laude	Next 10% of the total class following *summa* recipients
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Assistant Dean and Registrar

May 09, 2022

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Dear Judge Kelly:

I am delighted to provide this letter of reference for John Graham. I have been on the faculty at Harvard Business School for the last 24 years and at Harvard Law School for the last eight years. Although trained as an economist, I've been teaching tax law and tax policy at HLS for the last eight years. I came to know John when he was a student in my course on taxation at Harvard Law School in the fall of 2021. John received a Dean's Scholars Prize (high honors or top 5%) in recognition of his outstanding work in that course. I also had the pleasure of getting to know John through his attendance at my office hours when we discussed his interests more generally.

The introductory tax law class that John excelled in is known as one of the hardest business law classes at Harvard. It requires students to operate at many levels – we consider detailed statutory language, debate the merits of complex judicial decisions, evaluate the economic principles that guide policy, and outline the philosophical considerations that undergird tax law. In addition, it requires an understanding of the workings of advanced business transactions. I often am stunned at the breadth and depth of what students are expected to master – from the innards of the earned income tax credit, to the taxation of complex financial instruments, to welfare norms that guide optimal tax theory.

John excelled on all of these dimensions. The exam was 100% of the grade and was graded blindly and John's exam stood out for its clarity and thoughtfulness. That John received the highest grade attainable did not surprise. His participation in class was always thoughtful and he confidently asserted views on a variety of topics. He seemed to grasp both legal nuances and economic principles with equal skill. He was also able to constructively and respectfully debate with other students on various issues. I've attended the Law and Economics seminar where I've witnessed John's thoughtful participation and keen insights as well. His placement as a top 5% student in my tax class last year is an understatement of his achievement – I would consider him within the top 5% of students I've interacted with at HLS.

But, in your setting, I imagine you see many stellar grades. I have been particularly impressed with John's overall journey and his willingness to engage beyond the classroom. At a personal level, John combines his motivation with a wonderfully pleasant and respectful personality. As you can tell, I think you face an easy decision. Please don't hesitate to let me know if I can help further in your decision.

Sincerely,
Mihir Desai

Desai Mihir - mdesai@hbs.edu - 617-495-6693

JOHN MICHAEL GRAHAM
32 Copley Street, Unit #2, Cambridge, MA 02138 | jgraham@jd22.law.harvard.edu | 949-201-7901

Writing Sample

As a summer law clerk in the Antitrust Unit of the California Department of Justice, I prepared the attached memorandum regarding whether, in light of a recent California Supreme Court decision, Cartwright Act claims are likely to be tried by the court or by a jury.

It was produced under a time crunch because its answer affected the optimal strategy in ongoing settlement negotiations. I selected it because it is an accurate depiction of my typical work product on a deadline — meaning it was not edited by anyone at the CA DOJ nor by anyone after the fact. It was written for the attorney in charge of the relevant litigation and shared with both the front office of the Attorney General and co-counsel. I have received permission from my employer to use this memorandum as a writing sample. The recipient's name was redacted upon request.

State of California

Memorandum

Department of Justice
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

To: [redacted]
Deputy Attorney General
Antitrust Section
Office of the Attorney General

Date: June 10, 2020
Telephone: (949) 201-7901
E-mail: John.Graham@doj.ca.gov

From : John Graham
Summer Law Clerk
Antitrust Section

Subject: *Post-Nationwide: The Right to a Trial by Jury in Cartwright Act Causes of Action*

I. Overview

In *Nationwide Biweekly Administration*, the California Supreme Court resolved the question of whether, when the government seeks both injunctive relief and civil penalties under the False Advertising Law (FAL) or the Unfair Competition Law (UCL), the causes of action are to be tried by the court or a jury. The Supreme Court held that all UCL and FAL causes of action are equitable in nature and thus properly tried before the court, rather than a jury.[1] While the court carefully avoided determining "whether there is a right to a jury trial in *other* settings in which the government seeks injunctive relief and civil penalties," it nonetheless offered a useful framework for doing so.[2]

This memo will discuss whether, in light of *Nationwide*, causes of action arising from the Cartwright Act are likely to be tried by the court or a jury. Under California law, the right to a jury trial may be afforded either by statute or by the Constitution of the State of California.[3] A court is likely to find that the Cartwright Act provides a statutory right to a jury trial because, while the Cartwright Act does not explicitly provide such a right, its purpose and legislative history establish that the Legislature intended Cartwright Act claims be tried by a jury.[4] A court is also likely, although less so, to find that the California Constitution provides a constitutional right to a trial by jury in such cases because the "gist" of a Cartwright Act cause of action is legal, rather than equitable.[5]

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[1] *Nationwide Biweekly Admin., Inc., et al., v. Super. Ct. of Alameda Cty.*, 462 P.3d 461 (Cal. 2020); Cal. Bus. & Prof. Code, §§ 17200-17210; Cal. Bus. & Prof. Code, §§ 17500-17606.
[2] *Id.* at 28 (emphasis added).
[3] *Shaw v. Super. Ct.*, 393 P.3d 98, 104 (Cal. 2017); Cal. Const. art. I, § 16.
[4] *See Nationwide*, 462 P.3d at 464.
[5] *See id.* at 485.

II. *Nationwide Biweekly Administration v. Superior Court*

The case began with four county district attorneys suing Nationwide under the FAL, UCL, and other state laws, seeking an injunction to stop the advertisements in question, restitution to the misled customers, and statutory civil penalties. In its answer, Nationwide demanded a jury trial and California responded with a motion to strike the jury demand — which the trial court granted. Nationwide petitioned the California Court of Appeal to review. The appeals court found that Nationwide was indeed entitled to a jury on its UCL claims, although only as to the matter of liability, and not to the issue of civil penalties. The civil penalties were to be decided later by a judge, if the jury found liability. To reach this conclusion, the appeals court relied primarily on *Tull v. United States*, in which the United States Supreme Court made parallel findings. *Tull* held that, when the Government seeks civil penalties and injunctive relief under the Clean Water Act, the Seventh Amendment to the federal Constitution provides the right to a jury trial to determine liability, but not to assess civil penalties.[6]

The California Supreme Court — noting that the Court of Appeal's decision departed from a 45-year, uniform line of California Court of Appeal decisions holding that FAL and UCL claims were to be tried at equity — reversed.[7] The Supreme Court rejected the Court of Appeal's reliance on *Tull* because that was a case interpreting the federal right to a jury trial under the Seventh Amendment, which the California Supreme Court has found to be "entirely independent" of the constitutional right to a civil jury trial under the California Constitution. The court also expressed discontent with the "artificial" bifurcation of the determinations of liability and civil penalties — agreeing with Scalia in dissent that this created "a novel type of cause of action" that was unknown at common law.[8] It added that the legal and equitable elements of FAL and UCL causes of action were not separable anyway, because establishing a statutory violation of either triggers the availability of both injunctive and civil relief. Rather than separating an action's legal and equitable elements, the Supreme Court applied the "type of holistic gist of the action standard that California decisions have utilized in applying California's constitutional jury trial provision" to characterize the cause of action as a whole as either legal or equitable.[9]

After distinguishing the case at hand from *Tull* and its Seventh Amendment federal jury trial analysis, the Supreme Court proceeded to explain why the state civil jury trial right did not apply to actions under the FAL and UCL.[10] First, the court found that, as a statutory matter, the "legislative history and underlying purpose" of the FAL and UCL established the Legislature's intent that violations of these "very broadly worded consumer protection statutes" be decided by the "traditional flexible equitable authority" wielded by a judge in a bench trial.[11] Second, it

[6] *Id.* at 463-66.
[7] *Id.* at 464.
[8] *Id.* at 492.
[9] *Id.* at 484.
[10] *Id.* at 465.
[11] *Id.* at 464.

found that, as a state constitutional matter, actions arising from the FAL and UCL are not entitled to a trial by jury because the gist of those causes of action is equitable.[12]

Applying the framework presented by *Nationwide*, this memo will examine two main questions as they pertain to causes of action arising under the Cartwright Act: first, whether the Cartwright Act itself provides a statutory right to a jury by trial; and, second, whether there is a constitutional right to a jury trial supplied by the California Constitution. While, as the analysis will show, the answers to these questions are not certain, they are both likely to be answered in the affirmative.

III. Does the Cartwright Act provide a statutory right to a trial by jury?

"As a general matter, the California Legislature has authority to grant the parties in a civil action the right to a jury trial by statute, either when the Legislature establishes a new cause of action or with respect to a cause of action that rests on the common law or a constitutional provision."[13] As discussed in further detail in Section IV, the Cartwright Act created what was very likely a new cause of action, which is thus where the legislative authority to create the jury trial right is likely to arise in this instance.[14]

A. The Cartwright Act does not explicitly provide a jury trial right.

Whether or not the Cartwright Act provides a jury trial right is initially a question of whether the Legislature directly addressed the issue through the statutory text.[15] Throughout the Act there is no explicit mention of whether Cartwright causes of action entitle either plaintiffs or defendants to a jury trial.[16] Consequently, as was the case for the California Supreme Court with both the UCL and FAL in *Nationwide*, the reviewing court would need to look to the legislative history and purpose of the Cartwright Act. As another recent California Supreme Court case has made clear, "in the absence of textual guidance" from the Cartwright Act itself,[17] the court must rely on the legislative history — including "subsequent amendments" — and purpose in order to find the interpretation "most consistent with the legislative intent."[18] The law is clear that providing a statutory right to a jury trial in this way is quite possible.[19] Such an examination of the legislative history appears likely to establish the Legislature intended causes of action arising under the Cartwright Act to be actions at law triable by a jury.

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[12] *Id.* at 485.
[13] *Shaw*, 393 P.3d at 104 (Cal. 2017).
[14] *State of California v. Texaco*, 762 P.2d 385, 396 (Cal. 1988).
[15] *Nationwide*, 462 P.3d at 467.
[16] Cal. Bus. & Prof. Code §§ 16700-16770.
[17] *Nationwide*, 462 P.3d at 486.
[18] *Clayworth v. Pfizer*, 233 P.3d 1066, 1078 (Cal. 2010).
[19] *Standard Oil Co. of California v. Arizona*, 738 F.2d 1021, 1023-24 (9th Cir. 1984) (explaining that statutory silence "on the subject of jury trial … would not preclude a finding that the statutory scheme implicitly provides a right to jury trial independently of the [constitutional right.]")

B. The legislative history and purpose of the Cartwright Act likely establish the Legislature's intent that its causes of actions be tried by a jury.

The character of the remedies that have underpinned the Cartwright Act since its 1907 enactment, the jury instructions that accompany Cartwright Act causes of action, and more than a century of legislative acquiescence all point to a legislative intent that Cartwright Act causes of action be tried by a jury.

In *Nationwide*, the Supreme Court found that because the UCL cause of action created in 1933 authorized "only injunctive relief, there is no question that the civil cause of action created in 1933 was equitable in nature and, as such, was intended to be tried by a court and not a jury."[20] In 1972, the UCL, section 3369 of the Civil Code, was amended to include civil penalties to help provide a "sufficient deterrent."[21] The court found nothing in the legislative history of that 1972 addition or other later amendments that suggested "the Legislature intended that the action would be tried by a jury rather than by the trial court," and found the language describing the civil penalties to be clearly suggestive of an equitable intent by the Legislature.[22] The Supreme Court was additionally persuaded by the fact that California courts had, since the UCL's creation and after each amendment, continued to try UCL causes of action in equity.[23] The remedies the UCL offers, a lack of legislative history suggesting such causes of action were to be tried by a jury, and the precedent in California courts of equitable resolution convinced the court that the Legislature intended UCL causes of action to be equitable.

Applied to the Cartwright Act, this same analytical framework suggests the Legislature intended that Cartwright Act claims be entitled to a trial by jury. From its very inception in 1907, the Act offered not only injunctive relief and civil penalties, but also damages.[24] California courts are clear: "damages are a legal remedy."[25] Presumably aware of this reality, legislators seem likely to have intended that causes of actions they punished with remedies at law, be resolved at law. While one might argue that, in general, damages being one of "a full range of possible remedies does not guarantee … the right to a jury,"[26] such logic is inapposite here because that limited exception only applies when "the *only* manner in which the legal remedy of damages is available is by application of equitable principles."[27] That very exception is, in part, what led the Supreme

[20] *Nationwide*, 462 P.3d at 468.
[21] *Id.*
[22] *Id.* at 468-69.
[23] *Id.* at 468.
[24] Cal. Bus. & Prof. Code § 16750 (1907).
[25] *People v. ConAgra Grocery Products Co.*, 227 Cal.Rptr.3d 499, 569 (Cal. Ct. App. 2017).
[26] *C & K Engineering Contractors v. Amber Steel Co.*, 587 P.2d 1136, 1140 (Cal. 1978).
[27] *DiPirro v. Bondo Corp.*, 62 Cal.Rptr.3d 722, 747 (Cal. Ct. App. 2007); see also *Cent. Laborers' Pension Fund v. McAfee, Inc.*, 225 Cal. Rptr. 3d 249, 299 (Cal. Ct. App. 2017) (damages sought for breach of fiduciary duty and fraud causes of action did not entitle plaintiffs to jury trial, because assessing damages required application of equitable principles); but see

Court to characterize UCL causes of action as equitable even with the addition of civil penalties — because the UCL itself specifies a long list of factors "*the court*" shall consider in assessing the amount of the civil penalties.[28] The Cartwright Act cannot qualify for that exception because neither its award of civil penalties nor its award of damages is available "only" through equitable principles, and thus its monetary damages must be considered legal. The nature of the Cartwright Act's incipient and modern remedies suggest that the Legislature intended they be applied by a jury.

The long list of published Cartwright Act jury instructions suggests the same. Though the United States Supreme Court has cautioned that "jury instructions, whether published or not, are not themselves the law," it did note that when they are accurate they "restate the law."[29] This restatement of the law has been considered persuasive by California courts.[30] There are currently more than thirty published jury instructions specifically listed under the "Cartwright Act" chapter of the California Civil Jury Instructions (CACI).[31] They explain to the jury everything from market power to horizontal and vertical restraints in numerous contexts — all designed to aid juries in the resolution of Cartwright Act claims.[32] CACI No. 3440 on "damages" tells jury members that they "must decide how much money will reasonably *compensate*" the plaintiff.[33] This does not involve "the court" making the decision, does not involve equitable principles, and is even explicitly designed to "compensate," rather than deter. While the Legislature itself does not pass these jury instructions, it does participate in their creation through its representation on the Judicial Council of California that does.[34] Thus, it is at least aware of the extensive treatment of Cartwright Act claims as actions at law and there is no statutory change or legislative history evidencing an intent to change that. The more than thirty published jury instructions for the Cartwright Act and the language within them evidences treatment of such causes of action as legal; but together, they are also part and parcel of the evidence of legislative acquiescence to the handling of Cartwright Act claims by juries in California courts.

However, California courts have before, in the context of the Cartwright Act, considered damages to be incidental to a purpose of deterrence.[35] While this finding regarding relative

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Clayworth, 233 P.3d at 1083 (finding a private treble damages action to be "incidental" to the main purpose of the anti-trust laws).

[28] *Nationwide*, 462 P.3d at 488; Cal. Bus. & Prof. Code §§ 17206, 17536.

[29] *People v. Morales*, 18 P.3d 11, 20 n.7 (2001)

[30] *Christian Research Inst. v. Alnor*, 55 Cal.Rptr.3d 600, 609-10 (2007); *see, e.g.*, *Walker v. Sonora Reg'l Med. Ctr.*, 135 Cal.Rptr.3d 876, 885 (2012) (relying on CACI instruction to establish the duty of care owed by a hospital to patients); *Dep't of Fish and Game v. Super. Ct.*, 129 Cal.Rptr.3d 719, 743 (2011) (relying on CACI to establish the elements of a public nuisance claim); *Cobb v. City of Stockton*, 120 Cal.Rptr.3d 389, 394-95 (2011) (relying on CACI to establish the elements of a trespass claim).

[31] Judicial Council of California Civil Jury Instructions (2020 edition).

[32] *See* CACI No. 3400-3499.

[33] CACI No. 3440.

[34] Judicial Council of California Civil Jury Instructions (2020 edition).

[35] *Clayworth v. Pfizer*, 233 P.3d at 1083.

priorities was only in the context of a pass-on defense, if applied here, it could undermine the characterization of the remedies as a whole as being legal and work to rebut the evidence provided by the jury instructions.[36] If the court decided to instead rely on the larger historical evidence set suggesting that damages, especially compensatory ones, are legal, then that characterization as "incidental" may remain cabined to the pass-on defense. Which way the court falls on this is crucial because being on the "deterrence" side of the distinction between the two aims was a crux of the Supreme Court's decision to find that the legislature intended UCL claims bringing both injunction and civil penalties to be tried by the court; and should prove to be just as crucial to a California court in determining whether actions under the Cartwright Act permitting injunction, civil penalties, and damages were always intended by the Legislature to be tried by a jury.[37]

The Legislature's recurring decision not to intervene when California courts tried Cartwright Act causes of action with juries is further evidence of this legislative acquiescence. Since the Cartwright Act's 1907 enactment, California courts hearing Cartwright Act claims, whether alongside federal antitrust claims,[38] with business or tort claims,[39] or even with equitable UCL claims,[40] have repeatedly provided a jury trial. In 1919, the California Supreme Court considered an appeal of a conviction of Cartwright Act violations by a jury without in any way questioning why a jury was used.[41] In *Derish v. San Mateo-Burlingame Bd. Of Realtors*, the court cited both the jury trial provision of the California Constitution and the Cartwright Act itself when noting that "jury trial concerns [did] not apply to" that case because the claimants sued "first in state court under provisions of the Cartwright Act that clearly permit treble damages and jury trials."[42] In *Carver v. Chevron U.S.A., Inc.*, gasoline dealers sued an oil company for antitrust violations under the Cartwright Act and those claims were resolved by a jury.[43] As recently as 2014, in *California Caane Sch., Inc. v. Nat'l Com. For Certification of Crane Operators*, plaintiffs alleged antitrust violations, unfair competition, and related business torts and saw their claims resolved before a jury.[44] Although in an unpublished opinion, the California Court of Appeal for the Fourth District even went so far as to separately provide a jury trial for claims brought under the Cartwright Act before relegating the UCL claims to a bench trial.[45] Precedent matters — the California Supreme Court in *Nationwide* expressed clear frustration with the choice of a Court of

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[36] *See id.*
[37] *Nationwide*, 462 P.3d at 488-89.
[38] *See Amarel v. Connell*, 102 F.3d 1494, 1506 (9th Cir. 1996), as amended (Jan. 15, 1997).
[39] *See Carver v. Chevron U.S.A., Inc.*, 14 Cal.Rptr.3d 467 (Cal. Ct. App. 2004).
[40] *See McCampbell v. Ralphs Grocery Co.*, No. D034834, 2001 WL 1357372, at *1 (Cal. Ct. App. 2001) (review denied 2002).
[41] *See People v. H. Jevne Co.*, 178 P. 517 (1919)
[42] *Derish v. San Mateo-Burlingame Bd. of Realtors*, 724 F.2d 1347, 1351 (9th Cir. 1983) (overruled on other grounds).
[43] *See Carver v. Chevron U.S.A., Inc.*, 14 Cal.Rptr.3d 467 (Cal. Ct. App. 2004).
[44] *See California Crane Sch., Inc. v. Nat'l Com. for Certification of Crane Operators*, 171 Cal.Rptr.3d 752 (2014).
[45] *See McCampbell v. Ralphs Grocery Co.*, No. D034834, 2001 WL 1357372, at *1 (Cal. Ct. App. 2001) (review denied 2002).

Appeal to break a 45-year-long uniform line of appeals cases treating UCL claims as equitable.[46] It seems likely that any California court that chose to break a uniform line of Cartwright cases twice as long by declaring them equitable in nature would face just as unfavorable a reception by the Supreme Court.

One might counter that the uniform line of UCL cases was only so important in determining legislative intent because some of its decisions expressly addressed the decision to treat UCL causes of action as equitable.[47] While this distinction merits noting, it is not sufficient to undermine the value of the parallel line of Cartwright cases treated as legal, because there is an argument to be made that the jury trial right was not debated simply because it was not worthy of discussion. When causes of action alleging Cartwright Act violations have been considered legal for a century by the same California courts that have construed the Cartwright Act as "clearly permitting" jury trials, it becomes less surprising that both that litigants involved in Cartwright Act claims and the courts hearing them have not taken the time to debate whether a jury trial is required.[48] Although the century-long line of cases treating Cartwright Act claims as legal did not expressly consider their choice, it still seems highly likely that a California court would grant substantial weight to the consistent line of Cartwright Act claims being treated as legal.[49]

While the legislators are not themselves the ones causing the causes of action to be tried by jury, they have chosen over the course of more than twenty amendments to a 113-year-old statute to allow its violations to be treated at law, and have expressed no statutory intent to the contrary. Nor does the legislative history surrounding its 1907 enactment or its most substantial 1944 amendment suggest any intent to change how California courts handle Cartwright Act claims with a jury trial.[50] This legislative acquiescence has mattered to the Supreme Court before, even in its consideration of the very same act, and it is likely to factor significantly again.[51] In a case investigating what the Cartwright Act's enacting legislators did or did not intend regarding merger provisions, the California Supreme Court found it significant that the Legislature had not acted to explicitly include a merger provision, despite amending the Act at least 26 times between 1907 and 1988.[52] When again faced with the same question of what the California Legislature intended regarding the Cartwright Act, this acquiescence is likely to be weighed heavily as it has been before.[53]

Legislators equipped the Act with the fundamentally legal remedy of compensatory damages from its very enactment, have watched as California courts decided Cartwright Act claims by jury trial for over a hundred years, participated in the creation of dozens of Cartwright Act-

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[46] *Nationwide*, 462 P.3d at 486.
[47] *See id.*
[48] *Derish*, 724 F.2d at 1351 (9th Cir. 1983) (overruled on other grounds).
[49] *Nationwide*, 462 P.3d at 486.
[50] *See* Cal. Bus. & Prof. Code §§ 16700-16770 (1907); Cal. Bus. & Prof. Code §§ 16700-16770 (1944).
[51] *State of California ex rel. Van de Kamp v. Texaco, Inc.*, 762 P.2d 385, 394 (1988).
[52] *Id.*
[53] *Id*.

specific jury instructions to aid the courts in doing so, and have not once attempted to prevent juries from deciding Cartwright Act violations. The California Legislature has gone beyond acquiescence into implicit support, consequently, a California court is likely to find that the Legislature indeed intended Cartwright Act claims be entitled to a trial by jury.

IV. Is there a constitutional right to a jury trial in causes of action arising under the Cartwright Act?

Under California law, the right to a jury trial may be afforded either by statute or by the Constitution of the State of California.[54] If a court did indeed find that the Legislature intended to create a statutory right to a trial by jury for Cartwright Act causes of action, a reviewing court would need only engage in constitutional analysis in so far as it would be necessary to ensure the California Constitution does not *preclude* such a provision — which is exceedingly unlikely.[55] In all likelihood, a finding that the Legislature intended to create a jury trial right would be the end of the analysis and there would not be a need to decide whether the jury trial provision of the California Constitution provided a jury trial right, because the statute already did. If, however, the court does not find that the legislative history and purpose suggest an intent to provide a jury trial right, that constitutional analysis would be necessary. Accordingly, this memo will examine below what the likely route and result of such an analysis would be.

Article I, section 16 of the California Constitution begins by stating that "[t]rial by jury is an inviolate right and shall be secured to all."[56] From 1850 when this jury trial provision was incorporated into the State Constitution, until now in 2020, it has been consistently interpreted by California courts as preserving the right to a civil jury as it existed at common law at the time of incorporation.[57] Whether that right existed at common law for causes of action which would now arise under the Cartwright Act is, first and foremost, a historical question.[58] Pursuant to this historical approach, the California Constitution provides a right to a jury trial in common law actions at law that *were* triable by a jury in 1850, but not in suits in equity that were *not* triable by a jury in 1850.[59] Thus, if Cartwright Act actions have a common law counterpart, whether that counterpart was triable by a jury or not would be heavily determinative of whether the Cartwright Act causes of action in present day have a constitutional jury trial right. In the absence of a corresponding common law action, the court must instead look at the "statutory scheme as a whole to determine whether the gist of a Cartwright Act cause of action is legal or

[54] *Shaw v. Super. Ct.*, 393 P.3d 98, 104 (Cal. 2017); Cal. Const. art. I, § 16.
[55] California law is filled with examples of cases upholding the idea that the right to a jury by one's peers provided by article I, section 16 of the California Constitution is an inviolable right to be zealously guarded and, when in doubt, to be resolved in favor of the party requesting a jury trial. Cal. Const. art. I, § 16; *see, e.g.*, *Shaw*, 393 P.3d at 103-05.
[56] Cal. Const. art. I, § 16.
[57] *See, e.g.*, *Nationwide*, 462 P.3d at 480.
[58] *People v. One 1941 Chevrolet Coupe*, 231 P.2d 832, 835 (Cal. 1951).
[59] *Nationwide*, 462 P.3d at 464; *C & K Engineering Contractors v. Amber Steel Co.*, 587 P.2d 1136, 1139-40 (Cal. 1978).

equitable.[60] The below analysis details the reasoning for finding the following: first, the Cartwright Act causes of action lack a common law counterpart. Consequently, whether or not the California Constitution provides a right to a jury trial will depend on the "gist of the action" analysis. Finally, that gist of the action analysis is likely to show that the gist of the Cartwright Act and its causes of action as a whole is legal, and thus entitles parties to Cartwright Act litigation to a trial by jury.

A. Do Cartwright Act causes of action have a common law counterpart?

The California Supreme Court has made clear that this constitutional right is not to be narrowly construed.[61] The determination of whether an action was one triable by a jury at common law is not constrained by the title or form of the action, but "rather by the nature of the rights involved and the facts of the particular case — the gist of the action."[62] Nor is it, in practice, limited by the particular year of 1850.[63] Instead, any case of "like nature" or "the same class" as a common law action at law qualifies for jury trial right preservation.[64] For example, *One Chevrolet Coupe* was a civil lawsuit by the government seeking forfeiture of an automobile allegedly used in illegal activity.[65] The court ruled that the gist of the action in that case was legal because there existed at common law a similar cause of action for forfeiture of otherwise lawful property that was allegedly used for unlawful purposes which was triable by a jury.[66] So, if the claims at issue are of a similar nature to those triable by a jury at common law, the parties have a right to demand that they be tried by a jury today.[67]

[Detailed analysis excerpted for length.]

Consequently, "in the absence of common law counterpart," we must look to the statutory scheme as a whole in order to determine whether the gist of an action under the Cartwright Act is legal or equitable in nature.[68]

B. Is the gist of a Cartwright Act cause of action legal or equitable?

In considering the statute as a whole to make this characterization, the court will rely on, first and foremost, the history of Cartwright Act cases in California courts, as well as the remedies prescribed, and the character of the standard used to identify violations.[69] Altogether, the mixed results of these factors are likely to lead a California court to conclude that the gist of Cartwright

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[60] *Nationwide*, 462 P.3d at 484.
[61] *Id.* at 481.
[62] *Id.* at 480.
[63] *Id.* at 481.
[64] *Id.*
[65] *See People v. One 1941 Chevrolet Coupe*, 231 P.2d 832, 835 (Cal. 1951).
[66] *See id.*
[67] *Nationwide*, 462 P.3d at 480-82.
[68] *Id.* at 486.
[69] *See id.*

Act cause of action is legal, and thus intended to be tried by a jury. However, this conclusion is less certain than that of the statutory analysis.

[Detailed analysis excerpted for length.]

The relative weight and direction of the factors of precedent, the character of the remedies, and the substantive standards applied seem to point slightly more strongly to a gist of legal than equitable. If this were to be the outcome, a constitutional right to a trial by jury would be provided by the state Constitution.

V. Summary[70]

As a statutory matter, the more likely outcome seems to be that the Cartwright Act itself provides a jury trial right. The general character of the remedies that have underpinned the Cartwright Act since its 1907 enactment, the jury instructions that accompany Cartwright Act causes of action, and more than a century of legislative acquiescence all point to a legislative intent that Cartwright Act causes of action be tried by a jury.

As a constitutional matter, whether the Cartwright Act entitles litigants to a trial by jury is less clear than in the statutory case. It is unlikely that a court would find a common law counterpart, and as a result would conduct the gist of the action analysis depicted above. The most important factor, how it has been treated historically, weighs in favor of a legal gist. The outcome and impact of the remedies analysis is mixed and unclear. Despite likely not carrying as much weight as the previous two factors, the standard used does also seem to point more toward a legal gist than an equitable one. In total, a California court seems at least more likely than not to find that the California Constitution provides the right to a jury trial in causes of action arising from the Cartwright Act.

[70] Suggestions for further research: To compile and review the legislative history of all amendments to the Cartwright Act, rather than only that surrounding enactment and the most substantial amendment in 1944; To review the concurrent history/overlap of the Cartwright and Sherman Act to see if it could be of further support to this argument than its brief mention here.

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JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 17, 2022**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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April 17, 2022

The Honorable Timothy J. Kelly
U.S. District Court for the District of Columbia
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave., N.W.
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Dear Judge Kelly:

I am applying for a 2024-2025 clerkship in your chambers. Currently, I am a third-year *Juris Doctor* candidate at Georgetown University Law Center. After graduation, I will be an associate at Bailey & Glasser's Washington D.C. office, specializing in appeals.

Through my education and work experience, I have adopted a human-centric originalist legal philosophy. For instance, as an intern in your chambers, where I am preparing judicial opinions and making recommendations on pre-trial motions, I have seen—in sentencing hearings, in oral arguments, and in other court deliberations—how the law directly impacts the communities it serves. In my view, the law is inseparable from the people it serves.

Clerking in your chambers would also be informed by my previous experience at the International Rights Advocates (IRA), a nonprofit firm dedicated to litigating against multinational corporations committing human rights violations abroad, and the Department of Justice's Office of Legal Policy (OLP). At IRA and OLP, I advised superiors on complex litigation decisions and viability of federal court nominees respectively. For example, at IRA, I worked on several cases, including *Nestle v. Doe*, a Supreme Court of the United States case deciding the limitations of the Alien Tort Statute, where foreign child laborers were systematically harmed by American corporations. Child labor laws are incredibly vague and, thus, American courts have great difficulty addressing the laborers' claims. IRA interns, like judicial law clerks, must advise superiors on how, if possible, the harms can be addressed. Likewise, at OLP, I advised my superiors on federal court nominees, thus helping shape how courts address community harms. My advice was informed by vetting and by preparing nominees for their confirmation hearings, focusing on a nominee's legal philosophy and personal narrative. Accordingly, as a judicial law clerk, I want to utilize my experiences to help the court reach decisions in complex litigation, thereby helping me advise superiors in future.

After reviewing my resume, unofficial transcripts, writing sample, and my attached letters of recommendation, I believe you will agree that I am the type of effective and energetic candidate you are looking for. I can be reached at (678)-764-1325 or via email at apj12@georgetown.edu to arrange a convenient meeting time.

Thank you for your time and consideration, and I look forward to hearing from you.

Sincerely,
Ashton P. Jones-Doherty

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Tutor: Constitutional Law I: Federal Systems
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Experience

Bailey & Glasser **Forthcoming fall 2022**
Associate, Appellate and Supreme Court Practice Group Washington, D.C.

U.S. District Court for D.C., Chambers of Judge Timothy J. Kelly **January 2022 – Present**
Judicial Intern Washington, D.C.
- Drafted, revised, and cite checked decisions in both criminal and civil trials
- Recommended decisions to Judge Kelly and his law clerks
- Created sentencing tracking spreadsheets for Judge Kelly to promote case consistency

Department of Justice, Office of Legal Policy (OLP) **August 2021 – December 2021**
Law Clerk Washington, D.C.
- Vetted and prepared federal appellate and district court nominees for confirmation hearings
- Drafted OLP memoranda for Congress, government agencies, and the White House Counsel's Office
- Compiled information for Department of Justice spreadsheets on federal cases and their policy implications

Bailey & Glasser **May 2021 – August 2021**
Summer Associate Washington, D.C.
- Drafted complaints, briefs, memoranda, and other documents for trials and appeals
- Researched caselaw, legislative materials, and other sources for complex corporate and class action litigation
- Strategized with firm attorneys on originalist and living constitutionalist arguments for appellate litigation

Georgetown's Environmental Law and Justice Clinic **January 2021 – May 2021**
Student Attorney Washington, D.C.
- Strategized with clients and Clinic staff on opening/closing statements and witness examinations
- Prepared and filed both motions and briefs in the D.C. Superior Court and U.S. District Court for D.C.
- Negotiated with opposing parties in litigation for clients

International Rights Advocates **May 2020 – August 2020**
Law Clerk Washington, D.C.
- Drafted briefs for both D.C. Circuit and United States Supreme Court cases
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Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	001	94	Civil Procedure Kevin Arlyck	4.00	B	12.00	
LAWJ	002	43	Contracts Donald Langevoort	4.00	B	12.00	
LAWJ	004	94	Constitutional Law I: The Federal System Laura Donohue	3.00	B	9.00	
LAWJ	005	40	Legal Practice: Writing and Analysis Jonah Perlin	2.00	IP	0.00	

	EHrs	QHrs	QPts	GPA
Current	11.00	11.00	33.00	3.00
Cumulative	11.00	11.00	33.00	3.00

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	003	41	Criminal Justice Christy Lopez	4.00	P	0.00	
LAWJ	005	40	Legal Practice: Writing and Analysis Jonah Perlin	4.00	P	0.00	
LAWJ	007	94	Property Sheila Foster	4.00	P	0.00	
LAWJ	008	94	Torts Gary Peller	4.00	P	0.00	
LAWJ	1603	50	How to Regulate David Hyman	3.00	P	0.00	

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	19.00	0.00	0.00	0.00
Annual	28.00	11.00	33.00	3.00
Cumulative	30.00	11.00	33.00	3.00

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	1067	05	English Legal History Sem James Oldham	3.00	A	12.00	
LAWJ	121	09	Corporations Donald Langevoort	4.00	A-	14.68	
LAWJ	1663	05	The Federal Courts and the World Seminar: History, Developments, and Problems Kevin Arlyck	2.00	A-	7.34	
LAWJ	235	07	International Law I: Introduction to International Law H. Thomas Byron	3.00	P	0.00	
LAWJ	430	05	Recent Books on the Constitution Seminar Randy Barnett	2.00	A	8.00	

Dean's List Fall 2020

	EHrs	QHrs	QPts	GPA
Current	14.00	11.00	42.02	3.82
Cumulative	44.00	22.00	75.02	3.41

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	1288	08	Politics of Litigation and Litigation of Politics Robert Weiner	2.00	A	8.00	
LAWJ	528	06	Environmental Law and Justice Clinic (IPR) Hope Babcock		NG		
LAWJ	528	87	~Written & Oral Communication Hope Babcock	4.00	B+	13.32	
LAWJ	528	88	~Research & Analysis Hope Babcock	4.00	B+	13.32	
LAWJ	528	89	~Professionalism & Advocacy Hope Babcock	4.00	A	16.00	

	EHrs	QHrs	QPts	GPA
Current	14.00	14.00	50.64	3.62
Annual	28.00	25.00	92.66	3.71
Cumulative	58.00	36.00	125.66	3.49

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	1491	01	Externship I Seminar (J.D. Externship Program) Sandeep Prasanna		NG		
LAWJ	1491	119	~Seminar Sandeep Prasanna	1.00	A	4.00	
LAWJ	1491	121	~Fieldwork 3cr Sandeep Prasanna	3.00	P	0.00	
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties Randy Barnett	4.00	B+	13.32	
LAWJ	309	07	Congressional Investigations Seminar Robert Muse	2.00	A	8.00	
LAWJ	361	09	Professional Responsibility Philip Sechler	2.00	A-	7.34	
LAWJ	524	08	Supervised Research Donald Langevoort	1.00	IP	0.00	

	EHrs	QHrs	QPts	GPA
Current	12.00	9.00	32.66	3.63
Cumulative	70.00	45.00	158.32	3.52

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	1538	05	Constitutional Law: The First and Second Amendments Thomas Hardiman	1.00	P	0.00	

In Progress:

LAWJ	1286	08	Human Trafficking and Modern Slavery in the 21st Century: Legal Perspectives	2.00	In Progress		
LAWJ	1492	17	Externship II Seminar (J.D. Externship Program)	4.00	In Progress		
LAWJ	1778	08	Judicial Selection Process and Reforming	2.00	In Progress		

----------Continued on Next Page----------

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Ashton P. Jones-Doherty
GUID: 832680904

		the Supreme Court Seminar		
LAWJ	396	05 Securities Regulation	4.00	In Progress
LAWJ	524	08 Supervised Research	1.00	In Progress

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	1.00	0.00	0.00	0.00
Annual	13.00	9.00	32.66	3.63
Cumulative	71.00	45.00	158.32	3.52

End of Juris Doctor Record

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

April 17, 2022

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Dear Judge Kelly:

I am writing to strongly recommend Ashton Jones-Doherty for a clerkship. Ashton was a student in my seminar, Recent Books on the Constitution. The seminar included Paul Finkelman's Supreme Injustice: Slavery in the Nation's Highest Court, Eric Segall's Originalism as Faith, Greg Weiner's The Political Constitution: The Case Against Judicial Supremacy, Robert Ross's The Framers' Intentions: The Myth of the Nonpartisan Constitution, Jack Balkin's The Cycles of Constitutional Time, and my manuscript of my newest book, The Original Meaning of the 14th Amendment: Its Letter and Spirit. We take two weeks on each book. For the second class, students write a critique of the book and the author comes and visits the class.

Ashton received an "A," on the strength of his research, writing, and critical thinking skills on the numerous constitutional theories presented in these books. Two of his critiques were especially insightful, earning him the highest possible score. One of these was on Segall's Originalism as Faith. In his critique, Ashton incisively identified faults in Segall's claim that Supreme Court opinions are infected by a justice's policy preferences—even when such opinions are the product of institutional agreement. Ashton countered that Supreme Court opinions, especially ones that result from institutional agreements, are shaped by societal constraints rather than the justice's individual policy preferences; and, where an individual justice's policy preferences do correlate with a case result, it is because of these constraints rather than the justice's ideological priors.

To support his critique, Ashton presented his own research into the Court's decisions in The Legal Tender Cases and District of Columbia v. Heller, to illustrate how the Court, as an institution, decided these cases under political pressure. Ashton provided evidence that, in both cases, the Court drafted its majority opinions around institutional constraints and not an individual justice's ideological preferences. Crucially, when Ashton questioned Segall about this counterevidence during his visit to the class, Segall quickly abandoned his stance and announced that he needed to reevaluate his position. (Not that I expect he actually will.)

One of Ashton's many strengths is his ability to balance class work with his internships. Ashton has been an intern in the U.S. Department of Justice's Office of Legal Policy (OLP) and the Environment and Natural Resources Division (ENRD). At OLP, Ashton worked with U.S. Department of Justice leadership on federal policy developments in criminal, corporate, and constitutional law as well as vetting nominees for the federal appellate and district courts. Likewise, in the ENRD, Ashton provided crucial research for litigation strategy in trial and appeals. Additionally, Ashton provided essential research for International Rights Advocates' strategy in Supreme Court of the United States litigation, including for Nestle v. Doe, a case deciding the limitations of the Alien Tort Statute. Ashton's work ethic guarantees his work product will be top quality.

Finally, Ashton is a dedicated member of both Georgetown and Washington, D.C.'s legal community. As a tutor for my course on Constitutional Law I: Federal Systems, Ashton provided consistently clear and positive instruction to remedy confusion and prepare students for exams. As a Research Assistant Contributor for Georgetown Law Journal's Annual Survey of Criminal Procedure, Ashton provided first-rate research on criminal appeals for a leading academic law journal. As a student leader in both Outlaw and Georgetown's Committee on Investment and Social Responsibility as well as a member of The Federalist Society and the First-Generation Student Union, Ashton demonstrated his dedication to advancing the needs of the Georgetown community as well as the Washington, D.C. legal community.

I should also add that I have found interacting personally with Ashton to be very pleasant. For all these reasons, I highly recommend Ashton for a clerkship in your chambers. I am happy to discuss his candidacy with you on the phone. My cell phone is 617-780-1519, but I do not answer numbers I do not recognize. So please text or send an email before calling to let me know to expect your call.

Sincerely,

Randy E. Barnett
Patrick Hotung Professor of Constitutional Law
Director, Georgetown Center for the Constitution

Randy Barnett - rb325@law.georgetown.edu - 202-662-9936

U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General *Washington, D.C. 20530*

November 29, 2021

To whom it may concern:

I am a Senior Counsel and Intern Coordinator for the U.S. Department of Justice's (DOJ or Department) Office of Legal Policy (OLP), where Ashton Jones-Doherty is an intern this fall semester. I wholeheartedly recommend Ashton for a judicial clerkship, as he is a true intern super star. He has every attribute necessary to excel as a judicial clerk.

Ashton consistently provides top-notch work to OLP's attorneys, exhibiting strong research, writing, and speaking skills across the wide range of matters he has worked on while at OLP. He shows a strong attention to detail in the many projects that are assigned to him, which range from the different stages of work for judicial nominations to various policy and regulatory matters. Ashton's exceptional performance on these projects demonstrates his ability not only to work independently while meeting tight deadlines, but also his dedication and collegiality. His fellow interns greatly enjoy working with him.

One of Ashton's many strengths is his ability to handle work on multiple active projects successfully, timely responding with excellent work product for OLP's attorneys. He also provides thoughtful and pragmatic questions about his assignments, which improves the end work product.

Further, Ashton maintains a positive attitude and timely responds to all requests for information, be they large or small, which is a critical skill for any position. It is no surprise that Ashton is extraordinarily popular with the attorneys in OLP. They know that he will get the assignment done on time, and that the work product will be top quality.

We greatly appreciate that Ashton goes above and beyond the minimum time requirements for his internship with OLP, working substantially more than the required 20 hours each week, as well as working more weeks this fall than any of his fellow seven interns in OLP. He works extraordinarily quickly and efficiently, finishing projects at a rapid clip, and he is just as happy to take on the less substantive work that needs to get done in OLP as he is taking on the more substantive work that is assigned to interns. He is the consummate team player. Ashton has been a valuable contributor to other aspects of OLP's internship program as well, for instance by raising a number of excellent questions during intern events this fall.

Ashton is an integral part of the OLP team this semester, and I would be happy to discuss further Ashton's many strengths, including the wide swath of work he has done, and continues to do, for OLP. I can be reached at (202) 514-4608 or ileana.ciobanu2@usdoj.gov.

Sincerely,

Ileana Ciobanu

Ileana Ciobanu
Senior Counsel and Intern Coordinator

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

April 17, 2022

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Dear Judge Kelly:

Ashton Jones-Doherty has asked that I write to you in connection with his application for a judicial clerkship.

Ashton has been a student in a number of my classes, including a small section of first-year Contracts, and I have come to know him quite well. He is in the beginning stage of an independent writing project under my supervision on the subject of "corporate sovereignty."

Ashton is a delightful person, and quite smart. Far more than most students, he is fascinated by legal theory and history—in contrast to so many of his classmates interested mainly in that which produces good grades on a final exam. As you can see from his resume, he has sought out a number of internships in settings—like the Department of Justice's Office of Legal Policy as well as the Natural Resources Division at DOJ—where he can satisfy his intellectual curiosity while honing his legal research and writing skills.
Ashton's corporate sovereignty project promises to be an interesting one. While he is still in the deep research stage (i.e. no first draft is yet due), he has brought his characteristic enthusiasm to this stage of the work and given me a list of scholars with whose work on private sovereignty he intends to engage so that I can get up to speed.

Finally, Ashton is an exemplary citizen of the Georgetown community, heavily engaged in involvement and service, including membership on Georgetown's Investment and Social Responsibility Committee.

Based on all this, I think that Ashton would be a very good law clerk. Please let me know if I can be of any further information.

Sincerely,

Donald C. Langevoort
Thomas Aquinas Reynolds Professor of Law

Donald Langevoort - langevdc@law.georgetown.edu

Ashton Peter Jones-Doherty

450 K Street NW Washington, D.C. 20001/ apj12@georgetown.edu / (678) 764 -1325

Writing Sample

April 17, 2022

The Honorable Timothy J. Kelly
U.S. District Court for the District of Columbia
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001

Dear Judge Kelly:

The attached writing sample is a six-page excerpt of a paper I wrote for Professor Robert N. Weiner's Litigation of Politics and the Politics of Litigation seminar. The paper, "Practicing Courtcraft: Elites Have Influenced the Supreme Court Through Legal Organizations Since 1912," discusses the how professional groups have influenced the decisions of the Supreme Court of the United States. Because this paper is more than 40-pages, in order to reduce the length of this writing sample, the excerpt includes only the paper's introduction. The complete paper is available upon request. This paper represents only my research, drafting, and editing skills.

The paper's introduction discusses both the paper's main argument—*i.e.*, professional groups have influenced the Supreme Court and its justices, at least, since 1912—and its organizational layout.

Please let me know if you either have questions or would like the complete paper.

Thank you for your time and consideration,
Ashton P. Jones-Doherty

Introduction

In 1986, a few months after becoming the sixteenth Chief Justice of the United States Supreme Court, William H. Rehnquist, "revel[ing] in the attention he received as the new [C]hief [J]ustice,"[1] allowed visitors of the Court the rare chance of asking him questions.[2] One visitor asked Rehnquist: "'Do judges respond to public opinion?'"[3] Rehnquist could not "remember what [he] said to the gentleman who asked the question," but the question lingered in his mind and required "serious thought."[4] Like any good lawyer, Rehnquist wrote a law review article, entitled "Constitutional Law and Public Opinion," seeking to answer the visitor's question.[5]

According to Rehnquist, while justices "work in an insulated atmosphere in their courthouse where they sit on the bench hearing oral arguments or sit in their chambers writing opinions,"[6] they also "go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events."[7] Consequentially, justices, "so long as they are relatively normal human beings, can no more escape being influenced by public opinion … [than] can people working at other jobs."[8] Hence, Rehnquist concluded that "it is all but impossible to conceive of [justices] who are in any respect normal human beings who are not affected by public opinion."[9] However, while Rehnquist concludes that the justices are influenced by public opinion, he neither asks nor answers a consequential follow-up question: Whose opinions influence justices and, therefore, the Court?

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[1] *See* JOHN A. JENKINS, THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST 169–175, 223 (2012).
[2] *See* William Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 751 (1986).
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *See id.* at 768.
[7] *Id.*
[8] *Id.*
[9] *See id.* at 752.

The answer to this question is important because Americans hold differing beliefs; America is not a leviathan with a single aim. Indeed, as George F. Will asserts, "the definition of polity in terms of a comprehensive uniformity of belief has been thoroughly discredited … [because] one powerful lesson of the American experience is that unity is compatible with kinds and degrees of diversity" in beliefs.[10] Accordingly, since Americans have differing beliefs, it is important who influences Supreme Court justices. More specifically, it is important which newspapers a justice reads, which evening news program a justice watches, and what a justice's friends and family say about current events. All these factors—among others—may influence a justice's legal opinions.

Since Rehnquist published his article, legal scholarship has repeatedly returned to the question of whose opinions influence justices. Despite the breadth of discussion, the topic has only two consequential theoretical camps. One camp belongs to Barry Friedman, an acolyte of Robert Dahl.[11] Dahl famously maintains that "'the Supreme Court is inevitably a part of the dominate national alliance"[12] because "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[13] Friedman expands on Dahl's position in *The Will of the People: How Public Opinion Has Influenced The Supreme Court and Shaped the Meaning of the Constitution* by arguing that the Court is inherently a majoritarian institution.[14] According to Friedman, justices "care about public opinion … [because] they do not have much of a choice. At least, that is, if [the justices] care about preserving the Court's institutional power, about having their decisions enforced, about not being disciplined

[10] *See* GEORGE F. WILL, STATECRAFT AS SOULCRAFT: WHAT GOVERNMENT DOES 142 (1983).
[11] *See* NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 26–27 (2019) (comparing Barry Friedman to Robert Dahl).
[12] *See* Robert A. Dahl, *Decision Making in Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293 (1957).
[13] *See id.* at 285.
[14] *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 374–75 (2009).

by politics."[15] Thus, according to Friedman, because the Court cares about its institutional power, it is a majoritarian institution that represents the national consensus in its opinions.

Admittedly, Friedman's arguments have merit—reconsider former Chief Justice Rehnquist's position ("it is all but impossible to conceive of [justices] who are in any respect normal human beings who are not affected by public opinion …").[16] Further, former Justices Sandra Day O'Connor and Hugo L. Black provide evidence in support of Friedman's arguments. Justice O'Connor "'cultivat[ed] her public persona'" by making public appearances, publishing books for the general public, and doing television interviews.[17] She even admitted, in a 2002 *NBC Dateline* interview, that when the Court considers abortion cases, she is "'very much aware of [people's strong views on abortion] when we have a case in the area.'"[18] Consequently, it is not impossible that O'Connor's "thinking about prospective public reactions affected her judgments" on abortion.[19] Likewise, Justice Black "paid attention to the public."[20] For example, newspaper critics' opinions influenced Justice Black.[21] According to H. N. Hirsch—after the *Minersville School District v. Gobitis* decision, which allowed public school students the freedom to not salute the American flag under the Frist Amendment—Justice William O. Douglas spoke to Justice Felix Frankfurter:

> "Douglas: Hugo tells me that now he wouldn't go with you in the *Gobitis* case.
> 'Frankfurter: Has Hugo been re-reading the Constitution during the summer?
> 'Douglas: No—he has been reading the papers.'"[22]

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[15] *See id.* at 374.
[16] *See* Rehnquist, *supra* note 2, at 752.
[17] *See* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 69 (2006).
[18] *Id.*
[19] *Id.*
[20] *See id.* at 138.
[21] *See* H. N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 152 (1981); *see also* BAUM, *supra* note 17, at 68, 138 (discussing Hirsch's study on Frankfurter).
[22] *See* HIRSCH, *supra* note 21, at 152; *see also* BAUM, *supra* note 17, at 138 (discussing Hirsch's study on Frankfurter).

Of course, Justice Black's regret did not change the *Gobitis* decision; the decision had already been handed down. But the above conversation exemplifies Rehnquist's point that justices "go home … and read the papers"; for Justice Black was clearly influenced by the papers he read.[23] Still, it is unclear whose views both Justices O'Connor and Black are aware of; or whose views, to use Friedman's phrasing, are representative of the national consensus on a specific topic to the justices of the Court. Moreover, it is unclear if O'Connor's abortion decisions represent the national consensus on abortion, as it is unclear if Black's *Gobitis* regret represents the national consensus on students saluting the American flag. All that can be certain is two points. First, Justice O'Connor is openly aware of the Court's consequence on abortion rights, and she takes said importance into consideration when making decisions on abortion cases. Second, Justice Black was influenced by newspapers *after* the *Gobitis* decision. These two points are not proof that the Court has been influenced by national consensus on either abortion or on First Amendment rights. And certainly, these examples are not proof that the Court—as a whole—considers the national consensus on constitutional rights before making decisions.

Reacting to the weakness of Friedman's *Will of the People* argument, Lawrence Baum—who belongs to the other consequential theoretical camp—disagrees that national consensus influences the Court; instead, in *The Company They Keep: How Partisan Divisions Came to the Supreme Court* and in other works, Baum argues the Court is influenced by *elite opinions*.[24]

[23] *See* Rehnquist, *supra* note 2, at 768.

[24] *See* DEVINS & BAUM, *supra* note 11, at 9 ("…we argue that justices are more responsible to relevant segments of the social and political elite than to the public as a whole."); BAUM, *supra* note 17, at 123–31 (discussing judges and justices use legal organizations, like the Federalist Society, as a partisan audience supporting said judge or justice); Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 302 (2016) ("This article documents that today's Court is different from past Courts in the linkage between party and ideology. … That examination is based on the growth in polarization among political elites."); Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L. J. 1515, 1515 (2010) ("Supreme Court Justices care more about the views of academics, journalists, and other elites than they do about public opinion.").

According to Baum, America's elites are more likely to influence the Court's justices because the justices, as members of America's legal leadership, are elites themselves.[25] Further, most of the justices graduated from the same schools— *e.g.*, Yale, Harvard, etc.—and are often from the same socioeconomic background as America's elites.[26] These influences matter because, although elite opinions can mirror the national consensus on an issue, elite opinions—unlike the general American population's opinions—are usually more partisan.[27] However, like Friedman's argument, Baum's thesis is flawed because Baum maintains that the influence of elite opinions on the justices is a byproduct of America's hyper-partisanship.[28] To Baum, the contemporary Court (defined as the Roberts' Court), unlike previous Supreme Courts, is "uniquely" partisan because the justices are influenced by elite opinions.[29]

In contrast to Friedman's argument, this paper agrees with Baum that elites influence Supreme Court's justices. However, this paper disagrees with Baum that said influence is *just* a contemporary issue; it is not just a Roberts' Court issue. Instead, this paper argues elite opinions—as expressed through members of legal organizations like The House of Truth, a progressive legal organization founded in 1912, and The Federalist Society, a conservative and libertarian legal organization founded in 1981—have influenced the Supreme Court and its justices, at least, since 1912, the dawn of the Court's modern era.[30] Specifically, both The House of Truth and The Federalist Society have influenced the Court's membership and the justices' opinions. To properly explain how elite opinions—as expressed through members of legal organizations—have shaped the modern Court, this paper is split into two parts. Part One, entitled The House of Truth, explains

[25] *See id.* at 11, 41.
[26] *Id.*
[27] *See* DEVINS & BAUM, *supra* note 11, at 60–63, 84–102, 106–46.
[28] *See id.*; Devins & Baum, *supra* note 24, at 302.
[29] *See* DEVINS & BAUM, *supra* note 11, at 11–12, 41, 60–63, 84–102, 106–46; Devins & Baum, *supra* note 24, at 302.
[30] *See* BRAD SNYDER, THE HOUSE OF TRUTH: A WASHINGTON POLITICAL SALON AND THE FOUNDATIONS OF AMERICAN LIBERALISM at 3–5 (2017).

how the liberal elite network influenced Justice Oliver Wendel Holmes Jr.'s jurisprudence as well as Justices Louis D. Brandeis and Benjamin N. Cardozo's confirmations. Part Two, entitled The Federalist Society, explains how conservative elite networks influenced Justice Antonin Scalia's jurisprudence and Court confirmation battles. After these two parts, this paper concludes that elites have influenced the Court and its justices since, at least, 1912.

Applicant Details

First Name	**Sicily**
Middle Initial	**Male**
Last Name	**Kiesel**
Citizenship Status	**U. S. Citizen**
Email Address	**sicilymaleva@gmail.com**
Address	**Address** Street **8863 Riverwood Drive** City **North Ridgeville** State/Territory **Ohio** Zip **44039** Country **United States**
Contact Phone Number	**4406697944**

Applicant Education

BA/BS From	**Princeton University**
Date of BA/BS	**June 2019**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 11, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Chicago Journal of International Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Roin, Julie
julie_roin@law.uchicago.edu
773-702-9494
Kim, Hajin
hajin@uchicago.edu
773-702-9494

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Sicily Maleva Kiesel
1210 S Indiana Ave #1817 | Chicago, Illinois 60605 | skiesel@uchicago.edu | 440-669-7944

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, District of Columbia 20001

Dear Judge Kelly:

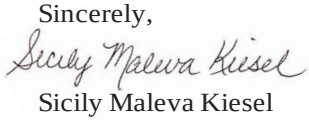
I am a third-year law student at the University of Chicago Law School seeking a judicial clerkship for the 2024 term. I am drawn to your experience with the Public Integrity Section of the DOJ. After graduation, I will join Jones Day's White Collar Investigations group. I may clerk in the 2023 term.

Being homeschooled while growing up on a farm, my primary and secondary education was experiential, community based, and active. From watching the birth of a baby alpaca and doing impromptu physics experiments with my brothers to traveling and learning throughout this country, I was free to learn while enjoying life. This infused a core passion for knowledge where there is no divide between living and learning. My educational outlook prepared me to be an excellent clerk because I view each research question, challenging situation, and assignment as an opportunity to learn and better understand the world and legal regime.

I developed my writing, analytical thinking, and research skills through my journal, academic, and professional experience. As a staffer on *the Chicago Journal of International Law*, I particularly enjoyed the opportunity to aid academics and fellow staffers make substantive, in-body edits to their writing and arguments. I was selected for Chicago's full-year course structured after a PhD colloquium that prepares students for a career in academia. Here, I explored foundational texts in the American legal tradition. Then, I researched and refined my own work of scholarship. At Jones Day I learned to write briefs, memos, and client alerts in the style and voice of assigning attorneys. My legal research and writing experience builds upon my award-winning undergraduate work at Princeton University. My experiential upbringing and educational outlook allowed me to thrive as Professor Martha Nussbaum's teaching assistant, where I taught twenty undergraduate students. I hope to bring my enthusiasm for engaged learning and appreciation for academic and legal research to my clerkship.

Thank you for your time and consideration. Please find my resume, law school transcript, undergraduate transcript, and writing samples attached. Recommendations from Professor Roin and Professor Kim will be forthcoming.

Sincerely,



Sicily Maleva Kiesel

Sicily Maleva Kiesel

1210 S Indiana Ave #1817 | Chicago, Illinois 60605 | skiesel@uchicago.edu | 440-669-7944

EDUCATION

The University of Chicago Law School, Chicago, IL | June 2022
J.D. Candidate

JOURNAL:	*The Chicago Journal of International Law*, Staffer
ACTIVITIES:	If/When/How: Lawyering for Reproductive Justice, Community Outreach Coordinator; California Law Students Association, Alumni Relations Director; Hemingway Society, Events Chair; Law Students for the Creative Arts, Member

Princeton University, Princeton, NJ | June 2019
A.B., *cum laude*, in English Literature & Language; Certificates in Dance, Gender & Sexuality Studies

HONORS:	*Earl R. Miner Thesis Prize*, Junior Year Academic Distinctions
CRITICAL THESIS:	*This Body Which is Not Mine: A Personal Analysis of Surgical Intrusion and Self*
PERFORMANCE THESIS:	σῶμα, *Corpus, Körper*
STUDY ABROAD:	Princeton in Argentina: Six-week cultural immersion in Advanced Spanish
ACTIVITIES:	Princeton Students for Reproductive Justice, Treasurer; Arch & Arrow Literary Magazine, Co-founder and Treasurer; eXpressions Dance Company, Strategic Planning Officer; Cloister Inn, Recruitment Chair

Deerfield Academy, Deerfield, MA | May 2015

EXPERIENCE

Jones Day, Cleveland, OH; San Francisco, CA
Incoming Associate, October 2022
Summer Associate, June–August 2020; June–August 2021

- Conducted legal research and completed writing assignments in a variety of practice areas, including Securities Litigation, Real Estate Finance, Health Care, Intellectual Property, Appeals, and Tax
- Drafted mediation statement regarding the Fair Credit Reporting Act and participated in mediation

Professor Martha Nussbaum, The University of Chicago Law School, Chicago, IL
Teaching Assistant for Opera in Theory and Practice, March–June 2021

- Held office hours and review sessions, answer student questions, and grade student papers
- Coordinated guest speakers, class materials, and lectures with Chicago Lyric Opera Director

Cuyahoga County Executive, Cleveland, OH
Executive Communications Assistant, June–August 2018

- Collaborated with HR and IT departments to write new recruitment website copy
- Strategized with county agencies and employees to gather perspectives, quotes, and job descriptions

Urban Studies Fellow, June–August 2017

- Composed speeches for Cuyahoga County Executive and Sheriff
- Spearheaded creation of news service collaboration between the county and municipalities
- Conducted data analysis and drafted comprehensive overdose report for use in strategic plan

Princeton University Office of Career Services, Princeton, NJ
Pre-Law Fellow, May 2018–June 2019

- Selected as 1 of 4 pre-law students to represent and work with the Pre-Law Adviser and program
- Mentored pre-law underclassmen on leadership, community engagement, and internships
- Welcomed visiting law schools and led pre-law conversations with underclassmen

Princeton University Formal Services, Princeton, NJ
Bartender, September 2016–April 2019

- Engaged with Alumni, faculty, and students while serving beverages for campus events and reunions

INTERESTS

- Classical Ballet; Barrel Racing; Poodles; Canine Agility; Experimental and Creative Writing; Body Theory

THE UNIVERSITY OF CHICAGO

Name: Sicily Maleva Kiesel
Student ID: 12248828

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2019
Current Status: Active in Program
J.D. in Law

External Education

Princeton University
Princeton, New Jersey
Bachelor of Arts 2019

EP or EF (Emergency Pass/Emergency Fail) grades are awarded in response to a global health emergency beginning in March of 2020 that resulted in school-wide changes to instruction and/or academic policies.

Beginning of Law School Record

Autumn 2019

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Richard Mcadams	3	3	179
LAWS	30211	Civil Procedure I William Hubbard	3	3	178
LAWS	30311	Criminal Law Jonathan Masur	3	3	180
LAWS	30611	Torts Jennifer Nou	3	3	179
LAWS	30711	Legal Research and Writing Patrick Barry Roseanna Sommers	1	1	178

Winter 2020

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law John Rappaport	3	3	180
LAWS	30411	Property Lee Fennell	3	3	EP
LAWS	30511	Contracts Eric Posner	3	3	EP
LAWS	30611	Torts Adam Chilton	3	3	179
LAWS	30711	Legal Research and Writing Patrick Barry Roseanna Sommers	1	1	178

Spring 2020

Course		Description	Attempted	Earned	Grade
LAWS	30221	Civil Procedure II Alison LaCroix	3	3	EP
LAWS	30411	Property Lee Fennell	3	3	EP
LAWS	30511	Contracts Eric Posner	3	3	EP
LAWS	30712	Lawyering: Brief Writing, Oral Advocacy and Transactional Skills Roseanna Sommers	2	2	EP
LAWS	43273	Emotion, Reason, and Law Martha C Nussbaum	3	3	EP

Summer 2020

Honors/Awards
The Chicago Journal of International Law, Staff Member 2020-21

Autumn 2020

Course		Description	Attempted	Earned	Grade
LAWS	42301	Business Organizations M. Todd Henderson	3	3	177
LAWS	44121	Introductory Income Taxation Julie Roin	3	3	180
LAWS	53455	Hacking for Defense Thomas Gossin-Wilson M. Todd Henderson	3	3	178
LAWS	57013	Canonical Ideas in American Legal Thought Thomas Miles Thomas Ginsburg Hajin Kim	3	3	177
LAWS	92000	Greenberg Seminars: Tyrants, Big and Small Bridget Fahey Aziz Huq	0	0	P
LAWS	94130	The Chicago Journal of International Law Anthony Casey	1	1	P

Date Issued: 04/01/2022

THE UNIVERSITY OF CHICAGO

Name: Sicily Maleva Kiesel
Student ID: 12248828

University of Chicago Law School

Winter 2021

Course		Description	Attempted	Earned	Grade
LAWS	41016	Professional Responsibility: Representing Business Organizations Daniel Feeney John Koski Brant Weidner	3	3	177
LAWS	42401	Securities Regulation M. Todd Henderson	3	3	177
LAWS	42801	Antitrust Law Eric Posner	3	3	178
LAWS	53322	International Humanitarian Law Darryl Li	3	3	179
LAWS	57013	Canonical Ideas in American Legal Thought Thomas Miles Thomas Ginsburg Hajin Kim	2	2	179
LAWS	92000	Greenberg Seminars: Tyrants, Big and Small Bridget Fahey Aziz Huq	0	0	P
LAWS	94130	The Chicago Journal of International Law Anthony Casey	0	0	P

Spring 2021

Course		Description	Attempted	Earned	Grade
LAWS	53219	Counterintelligence and Covert Action - Legal and Policy Issues Stephen Cowen Tony Garcia	3	3	180
LAWS	57013	Canonical Ideas in American Legal Thought Thomas Miles Thomas Ginsburg Hajin Kim	2	2	179
LAWS	63312	Workshop: Regulation of Family, Sex, and Gender Mary Anne Case	1	1	181
LAWS	92000	Greenberg Seminars: Tyrants, Big and Small Bridget Fahey Aziz Huq	1	1	P
LAWS	94130	The Chicago Journal of International Law	2	2	P
Req Designation:		Meets Substantial Research Paper Requirement Anthony Casey			

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	53110	Project and Infrastructure Development and Finance Martin Jacobson	3	3	179
LAWS	53229	Cross-Border Transactions: Law, Strategy & Negotiations Tarek Sultani	1	1	182
LAWS	53397	Divorce Practice and Procedure Erika Walsh Donald Schiller	3	3	178
LAWS	53454	The Internet Economy Jared Grusd	2	0	

Winter 2022

Course		Description	Attempted	Earned	Grade
CRWR	44019	Advanced Nonfiction Workshop: Experimental Essay Lina Maria Ferreira Cabeza-Vanegas	3	3	A
LAWS	43242	Corporate Tax I David A Weisbach	4	4	179
LAWS	45801	Copyright Randal Picker	3	0	
LAWS	63312	Workshop: Regulation of Family, Sex, and Gender Mary Anne Case	1	0	

End of University of Chicago Law School

Date Issued: 04/01/2022

Sicily Maleva Kiesel
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As a Summer Associate at Jones Day, I prepared the attached memorandum for a securities litigation assignment. I researched the self-critical analysis privilege in the Third Circuit and under Pennsylvania Law and applied the research to an internal audit report which the client sought to shield from discovery. The memorandum was subsequently submitted to the client's general counsel.

I performed all research and personally wrote the memorandum. I received general comments and questions from the supervising partner, Geoffrey Ritts. I did not receive any line edits. All identifying facts and names have been changed for confidentiality purposes. I removed a section on Pennsylvania state law for brevity. I am submitting this writing sample with the permission of Jones Day and the client.

MEMORANDUM

TO: Geoffrey Ritts; Adrienne Mueller

FROM: Sicily Maleva Kiesel

DATE: June 26, 2020

RE: Self-Critical Analysis Privilege in the Third Circuit as Applied to Critical Internal Audit Report

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Question Presented

In early 2017, EY—functioning as internal auditor for Willow Corporation ("Willow")—prepared a critical internal audit report concerning the Company's reliability-centered maintenance ("RCM" or "reliability") practices at certain of its plants. This audit report contained candid evaluations and criticisms of current practices as well as recommendations for improvement. Willow seeks to shield this document from discovery. This memo analyzes the self-critical analysis privilege in the Third Circuit and whether the privilege applies to Willow's self-critical internal audit.

Brief Answer

Courts inconsistently recognize the self-critical analysis privilege, and the Court is unlikely to apply the privilege to the internal audit report. The Third Circuit has not explicitly ruled on whether a federal common law privilege exists but has stated in dicta that no such privilege exists. District courts within the Third Circuit are split on whether federal common law recognizes a self-critical analysis privilege. Courts typically consider: the purpose of the evaluation, whether the evaluation relates to compliance with regulations or laws, whether discovery would chill similar candid self-evaluations, and whether granting privilege would further the public interest. Courts

find the privilege exists when a judge personally believes discovery would discourage candid self-evaluation. Given the factors and purpose of the doctrine, the Court is unlikely to deem the internal audit report privileged under the self-critical analysis privilege, because the report was not mandated by regulation and Willow would likely conduct similar audits even if discoverable.

Facts

Willow and its current or former officers are defendants in a securities fraud class action in the United States District Court for the Western District of Pennsylvania. The claim arises under section 10(b) of the Securities Exchange Act of 1934. Plaintiffs allege that defendants made a series of false statements to the public over a 15-month period. The price of Willow stock subsequently fell and allegedly caused plaintiffs $1.5 billion in damages.

During the period in question, Willow sought to implement RCM across its facilities. Willow employed EY to perform a reliability-centered maintenance audit of its plants. Near the end of the 15-month period, EY produced a critical-internal audit report assessing reliability and providing conclusions, suggestions, and criticisms. The audit report reflected a candid self-analysis undertaken to improve Willow's maintenance practices. Because the internal audit report contains self-critical analysis Willow would like to resist production during discovery.

Discussion

The self-critical analysis privilege is unlikely to apply to the internal audit report both because it does not clearly meet the general criteria for the privilege and because the Third Circuit is mixed in its recognition of the privilege.

Statutory and Common Law Basis for the Self-Critical Analysis Privilege

The self-critical analysis privilege—also called the self-evaluation or peer review privilege—shields institutional self-analyses from discovery. The privilege only applies to subjective or evaluative material, not objective materials or facts. *Webb v. Westinghouse Electric Corp.*, 81 F.R.D. 431, 434 (E.D. Pa. 1978) (finding that subjective evaluations in the requested materials were protected by the self-critical analysis privilege, but "objective data contained in those same reports" were not protected); *McAllister v. Royal Caribbean Cruises, Ltd.*, No. 02-2393, 2004 U. S. Dist. LEXIS 20159, at *1 (E.D. Pa. Oct. 4. 2004) (holding that the self-critical analysis privilege applied to protect reports containing mostly subjective and evaluative material).

The self-critical analysis privilege has no statutory basis and therefore, to the extent it exists, it is based in common law. Federal Rule of Evidence 501 governs the law of privilege. Such privilege "shall be governed by the principles of the common law as they may be interpreted by the court of the United States in the light of reason and experience." Fed. R. Evid. 501. *See also Jaffee v. Redmond,* 518 U. S. 1, 8 (1996).

Rule 501 allows flexibility to develop privilege on a case-by-case basis. However, the Supreme Court and Third Circuit have scrutinized creating or extending privileges. *University of Pennsylvania v. E.E.O.C.*, 493 U. S. 182, 189 (1990) ("[W]e are disinclined to exercise [the authority to craft new privileges under Rule 501] expansively."); *United States v. Nixon,* 418 U. S. 683, 710 (1974) ("exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."); *Pearson v. Miller,* 211 F.3d 57, 67 (3rd Cir. 2000) ("with very limited exceptions, federal courts have generally declined to grant requests for new privileges"). Because the Supreme Court cautions against expanding

federal privileges, the self-critical analysis privilege is not a fully-fledged privilege, but rather a case-by-case balancing test.

The privilege first developed in the context of medical peer review to encourage frank evaluation and improvement of medical practices. *Bredice v. Doctors Hospital*, 50 F.R.D. 249, 251 (D.D.C. 1970), *aff'd without opinion*, 479 F.2d 920 (D.C. Cir. 1973). The court worried that disclosure would chill critical self-analysis and ultimately punish attempts to improve care. *Id.* at 250. Thus, the privilege is rooted in public policy and the notion that candid, critical self-evaluation benefits the public through institutional improvement. *Id; Granger v. Nat'l R. Passenger Corp.*, 116 F.R.D. 507, 509 (E.D. Pa. 1987) ("one of the purposes of the [self-critical analysis] doctrine is to prevent a 'chilling' effect on self-analysis and self-evaluation prepared for the purpose of protecting the public by instituting practices assuring safer operations.").

Courts subsequently applied the privilege to candid evaluations of company practices, investigations of accidents, and compliance with regulations and legal standards. *See Lasky v. American Broadcasting Co., Inc.*, 5 Fed. R. Serv. 3d 1366 (S.D.N.Y. 1986) (self-evaluative privilege exists in cases of violations of securities law, medical malpractice, violations of civil rights, and libel). Yet, many courts decline to recognize the privilege, because they do not believe the free flow of information will be impaired if discoverable. Although these courts assert the privilege is not recognized, they usually ground their statements in a rejection of the privilege's underlying theory—encouraging candid institutional analysis. *See In re Ashanti Goldfields Securities Litig.*, 213 F.R.D. 102, 105-06 (E.D.N.Y. 2003) (collecting cases where courts believed discovery would not curtail institutional self-critical evaluations because business interests were sufficiently great to encourage candid analyses).

Overall, courts only recognize the privilege in exceptional circumstances furthering the public interest. *For privilege applied to general company practices, compare In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197, 206 (E.D.N.Y. 1992) (finding peer review privilege for a report and comments on internal quality controls to encourage corporate reflection), *and New York Stock Exchange v. Sloan*, 22 Fed. R. Serv. 2d 500 (S.D.N.Y. 1976) (accounting records), *and Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518 (E.D. Tenn. 1977) (product safety assessments), *with In re Ashanti Goldfields Sec. Litig.*, 213 F.R.D. 102, 105–07 (E.D.N.Y. 2003) (considering a Policy Blueprint and finding no privilege and no compelling public benefit in confidentiality because business interests encourage self-critical evaluations and discovery would not chill such analyses). *For privilege applied to injury reports, compare Granger*, 116 F.R.D. at 510 (railroad injury), *and In re Block Island Fishing, Inc*., 323 F. Supp. 3d 158 (D. Mass. 2018) (fishing accident), *and Richards v. Maine Cent. R.R.*, 21 F.R.D. 590 (D. Me. 1957) (railway accident), *with Bobryk v. Durand Glass Mfg. Co., Inc.*, CIV. 12-5360, 2013 WL 5604342 (D.N.J. Oct. 11, 2013) (no privilege for accident reports because companies will still conduct investigations). *For privileged evaluations of compliance with regulations and employment law, see Bracco Diagnostics, Inc. v. Amersham Health Inc.*, CIV.A. 03-6025, (FLW), 2006 WL 2946469, at*3-9 (D.N.J. Oct. 16, 2006) (pharmaceutical sales and marketing laws and regulations); *McClain v. Mack Trucks*, 85 F.R.D. 53, 58 (E.D. Pa. 1979) (compliance with anti-discrimination laws); *Sanday v. Carnegie-Mellon Univ.*, 22 Fed. R. Serv. 2d 1424 (W.D. Pa. 1975) (compliance with affirmative action plans); *Banks v. Lockheed–Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971) (defense contractor's confidential assessment of its equal employment opportunity practices).

Therefore, to gain privilege protection under the doctrine of self-critical analysis, the party asserting the privilege must demonstrate the existence of a strong public policy rationale for granting the privilege.

Factors and Considerations When Applying Privilege

The precise parameters of the self-critical analysis privilege remain unclear. However, courts continually discuss three factors to decide whether reason and experience favor shielding a document:

> (1) the information must result from a critical self-analysis undertaken by the party seeking protection;
>
> (2) the public must have a strong interest in preserving the free flow of the type of information sought;
>
> (3) the information must be of a type whose flow would be curtailed if discovery was allowed.

Reichhold Chemicals, Inc. v. Textron Inc., 157 F.R.D. 522, 527 (N.D. Fla. 1994).

Additionally, courts often require the material be considered confidential. *Id; In re Block Island Fishing, Inc.*, 323 F. Supp. 3d 158, 163 (D. Mass. 2018). Many courts also consider whether the information was mandated by or for compliance with government regulations. *E.g., see Paladino v. Woodloch Pines, Inc.*, 188 F.R.D. 224, 226 (M.D. Pa. 1999) ("[T]he 'self-critical analysis privilege will not extend to reports, analyses, surveys and the like which are not mandated by the government.").

Some courts additionally hold that only after-the-fact reports qualify, while other courts find no such requirement. *Compare Reichhold*, 157 F.R.D. at 528 ("[privilege] applies only to reports which were prepared after the fact for the purpose of candid self-evaluation and analysis of the cause and effect"), *with In re Crazy Eddie Sec. Litig.*, 792 F. Supp. at 206 (applying privilege

to an accounting firm's internal quality control reviews, reports, and commentary because discovery would chill attempts to monitor and improve the quality of work), *and Bracco Diagnostics*, 2006 WL 2946469, at *3-9 (recognizing privilege as applied to a PWC report analyzing both current compliance and suggestions to increase compliance with pharmaceutical sales and marketing laws and regulations because self-evaluation and improvement of compliance are in the public's interest). As stated, the privilege rests upon public policy concerns and, therefore, courts generally find the privilege *only* when the information is clearly of the type whose flow would be curtailed if discovery was allowed.

The Self-Critical Analysis Privilege in The Third Circuit

District courts within the Third Circuit apply the doctrine of self-critical analysis privilege sporadically and inconsistently. The precedent within the Circuit cannot be wholly reconciled. Similar to the privilege generally, courts seem to recognize the privilege when individual judges believe it furthers the public interest. *Compare Dickerson v. Willow*, No. 73-292, 1976 WL 596, at *1-2 (E.D. Pa. July 16, 1976) (finding privilege on grounds of public policy as applied to a government-mandated affirmative action review, plan, and self-analysis because the quality and candor of such reports and evaluations depend on the employer's "good faith" and compelled disclosure will discourage employers from making these candid evaluations and encourage them to set equal employment goals at minimum levels), *with Spencer Savings Bank, SLA v. Excell Mortgage Corp.*, 960 F. Supp. 835, 842-45 (D.NJ. 1997) (considering an external loan audit, the court held that no self-critical analysis privilege exists at federal common law because it does not serve the public interest as companies would still perform candid self-evaluations and, if

production would be against the public interest, in most cases attorney-client privilege or the work product doctrine would already shield the document.).

The Court of Appeals has not explicitly ruled on whether a common law self-critical analysis privilege exists in the Third Circuit. However, in *Alaska Elec. Pension Fund v. Pharmacia Corp.*, the court commented in a footnote, "the self-critical analysis privilege has never been recognized by this Court and we see no reason to recognize it now." 554 F. 3d 342, 351 n.12 (3rd Cir. 2009). Yet, courts within the Third Circuit had, in fact, recognized the privilege for over 30 years. *Slaughter v. Nat'l. R.R. Passenger Corp.*, No. Civ.A. 10-4203, 2011 WL 780754, at *4 (E.D. Pa. Mar. 4 2011) (collecting cases recognizing the privilege prior to *Alaska*).

Although the Third Circuit's statement in *Alaska* was mere dicta, district courts subsequently have declined to apply the privilege. *E.g. Smith v. Life Inv'rs Ins. Co. of Am.*, No. 2:07-CV-681, 2009 WL 3364933, at *8 (W.D. Pa. Oct. 16, 2009) (considering an outside counsel's report on internal company misconduct and finding self-critical analysis privilege did not exist at federal common law because the Third Circuit has never recognized the privilege); *Sabric v. Lockheed Martin,* No. 3:09-cv-2237, 2011 U. S. Dist. Lexis 17630, at *3–4 (M.D. Pa. Feb. 23, 2011) (noting the Third Circuit "expressly declined to recognize the privilege," and declining to apply); *Craig v. Rite Aid Corp.,* No. 4:08-CV-2317, 2010 WL 5463292, at *5 (M.D. Pa. Dec. 29, 2010) (stating "we are doubtful of the privilege's validity in the Third Circuit ...." and refusing to apply). Nevertheless, the court in *Klein* expressly recognized the privilege, even after *Alaska*. *Klein v. Madison,* No. 17-4507, 2018 U. S. Dist. LEXIS 121420, at *12 (E.D. Pa. July 20, 2018) (The court explicitly recognized the self-critical analysis privilege with no explanation and requested an *in camera* review to decide if the privilege applied. The suit pertained to police

misconduct arising under violation of both federal and state law). Without a controlling Third Circuit opinion, the privilege continues to be recognized on a case-by-case basis.

Within the Western District of Pennsylvania, the self-critical analysis privilege has been considered only a few times. Courts in the Western District discuss the privilege with similar reasoning, concerns, and factors as other courts discussed. In *Sanday v. Carnegie-Mellon University*, the court considered government-mandated affirmative action plans and self-evaluations of equal employment. 22 Fed. R. Serv. 2d. at 1424. The court withheld documents from discovery because the government regulations "foster candid reflection and internal evaluation." *Id*. The judge believed disclosure would discourage this candid and critical self-evaluation and defeat the regulation's primary purpose. *Id*. Thus, the court recognized the privilege because it was in the public's interest. Interestingly, the court recognizes privilege under the doctrine of self-critical analysis but does not employ this terminology. Rather, the court finds 26(b) fully enables shielding a document from discovery when in the public interest, regardless of a specific doctrine. Furthermore, the court in *Howard v. Rustin* implied it would recognize the privilege if the interest in promoting candor outweighed the need for probative evidence. Civ. A. No. 06-00200, 2008 U. S. Dist. LEXIS 133289, at *11 (W.D. Pa. Sep. 16, 2008) (declining to recognize the privilege "in this case" as applied to a Mortality Review because constitutional rights were allegedly violated and the review was the only source of evidence). However, citing the Third Circuit's dicta in *Alaska*, the court in *Smith* stated the privilege did not exist in any circumstance at federal common law. 2009 WL 3364933, at *8 (considering an outside counsel's undated report on internal company misconduct). Although *Smith* postdates *Sanday* and *Howard*, the Western District has recognized and acknowledged the self-critical analysis privilege.

Barring exceptional circumstances, the self-critical analysis privilege is unlikely to apply within in the Third Circuit. If the facts clearly support privilege in the interest of the public, then a court may recognize the privilege. Such facts likely would include compliance with governmental regulations, a genuine desire to improve compliance, an expectation of confidentiality, and a marked shift away from candor if discovery were allowed.

Privilege as Applied to the Willow Audit Report

The self-critical analysis privilege is unlikely to shield Willow's critical internal audit report. Because the internal audit report was not for compliance with government regulations, mandated by the government, or following an accident, the document does not fit cleanly within precedent. Additionally, a court is unlikely to believe that Willow will cease audit reports of this nature because the purpose of the audit report was to improve the Company's approach to RCM, which ultimately increases Willow's profitability. Therefore, the Court likely will not recognize the self-critical analysis privilege in this case.

The two cases most similar to Willow's internal audit report are both securities fraud actions out of the Eastern District of New York. *In re Ashanti Goldfields Sec. Litig.*, 213 F.R.D. (declining privilege); *In re Crazy Eddie,* 792 F. Supp. (finding privilege).

Ashanti concerned a Ghanaian gold mining company's "hedge" book which critically analyzed the company's financial instruments and hedging activities. *In re Ashanti Goldfields Sec. Litig.*, 213 F.R.D. at 103. The plaintiff's alleged misrepresentation of the hedging activities and financial conduct generally because – plaintiff said – the "hedge" book was designed to insulate Ashanti from market volatility but actually materially increased exposure to market volatility through reckless speculation. *Id.* In declining to apply the privilege, the court thoroughly

considered the underlying motivations of the self-critical analysis privilege. The court determined that discovery would not impede future self-critical analyses and evaluations of the hedge book or other business-related policies because these analyses increase profits and, therefore, significant incentives to engage in candid self-evaluation remain. *Id.* at 104-07. Moreover, the court stressed that defendants failed to identify how privilege would further any desirable or important social policies, stating "strong public policy simply doesn't apply here." *Id* at 106. Therefore, because Ashanti retained a strong business interest in continuing critical self-evaluations of business practices and the court found no benefit to the public interest in withholding production, the court refused to apply the self-critical analysis privilege.

The court in *In re Crazy Eddie* reached the opposite conclusion. 792 F. Supp. at 205-06. There, Peat Marwick audited and certified Crazy Eddie's financial statements. *Id.* Plaintiff's alleged Peat Marwick affirmatively misrepresented its audits to Crazy Eddie's Board of Directors. *Id.* During the period of alleged misrepresentations, Peat Marwick conducted an internal self-quality audit both generally and on its work for Crazy Eddie. *Id.* The court found Peat Marwick's internal quality control audit privileged under the self-critical analysis doctrine because the public has a strong interest in encouraging companies to critically evaluate the quality of their work. *Id.* The court reasoned that discovery would chill these types of audits or inhibit candid criticism. *Id.* Additionally, because the plaintiffs could discover the underlying factual data, the application of the privilege would not prejudice the plaintiffs. *Id.* Ultimately, the court felt the public interest in encouraging candid quality control audits outweighed the plaintiff's need for this specific evidence.

Although this precedent is outside the Third Circuit, Willow could advance similar reasoning to *In re Crazy Eddie*, while distinguishing itself from *Ashanti*. The Willow audit report

does seem motivated by business and financial interests and a court might find these interests sufficiently strong to counter any chill discovery might impose. However, the public has a much stronger interest in candidly evaluating the maintenance practices of U. S.-based willow plants than a foreign-based mining company's financial practices. Furthermore, depending on the exact facts of the audit report, critically evaluating reliability could be tied to an interest beyond improving company profits such as worker safety or other factors in which the public has an even stronger interest. As Willow would be far less likely to honestly investigate its practices if audit reports were discoverable, Willow could maintain that the public interest favors confidentiality. Because the court in *Ashanti* stressed the absence of a public interest, the Willow audit report could be distinguished on these grounds. Moreover, the Willow audit report is similar to *In re Crazy Eddie* because both pertain to evaluations of the quality of company practices. Furthermore, because the Willow plaintiffs likely have access to the underlying data, Willow could convincingly argue that the plaintiffs' interest in the subjective evaluations and analysis of that data is minimal. This is important because the self-critical analysis privilege is a balancing test where the public interest has to outweigh the plaintiffs' need in this specific case.

Willow could argue that the public has an interest in U.S. companies candidly evaluating and improving the maintenance practices of industrial plants. Because of this public interest, the minimal prejudice to plaintiffs, and the chilling effect of discovery, Willow could assert the self-critical analysis privilege. The privilege would likely only protect the subjective and evaluative portions of the audit report, not factual or objective information. The successful application would depend on the exact nature and content of the audit report, as well as the sympathies and tendencies of the particular judge

Applicant Details

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Applicant Education

BA/BS From	**Benedictine University**
Date of BA/BS	**May 2018**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 31, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Journal on Poverty Law and Policy**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Paulina Piasecki
313 East 61st Street, Apt. #6A
New York, N.Y. 10065
March 30, 2022

The Honorable Timothy Kelly
U.S. District Court for the District of Columbia
333 Constitution Avenue, N.W.
Washington D.C. 20001

Dear Judge Kelly:

I am a first-year associate at Schulte Roth & Zabel and Georgetown Law alumna. I am writing to apply for a clerkship in your chambers for your next available term.

Like your Honor, I am a fellow Hoya and *Federalist Society* member who aspires to be a federal prosecutor. I am drawn to litigation and the unique opportunity it gives attorneys to showcase skills in oral and written advocacy. Since college, I have been intimately involved with trial advocacy. During law school, I served as co-director of the trial advocacy team and competed nationally, helping the team secure its ranking as second in the Nation. After graduating law school, I was asked to serve as a coach for the team, which I now do in my spare time. I also take pride in my legal writing, a skill that I have worked hard to build over the course of my legal education and career in writing courses, internships, and now as an associate at Schulte Roth & Zabel. In this role, I have further developed my core legal writing skills and learned about a new area of law. To that end, I believe serving as a clerk in your chambers would provide me the unique opportunity and privilege to serve the American public while gaining invaluable experience as a young lawyer.

I have enclosed my resume, my unofficial law school transcript, my undergraduate transcript, several letters of recommendation, and a writing sample for your review. Letters of recommendation are attached from the following:

Professor Randy E. Barnett
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Professor Deborah Epstein
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Please let me know if I can provide any additional information. I can be reached at (847) 687-6115 and pp652@georgetown.edu. Thank you very much for your time and consideration.

Respectfully,
Paulina Piasecki